89-187

No. 89-

In The

Supreme Court of the United States

October Term, 1989

JACK McCORMICK,
Warden of the Montana State Prison, and
MARC RACICOT,
Attorney General of the State of Montana,

Petitioners,

v.

DEWEY E. COLEMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARC RACICOT
Attorney General
PATRICIA J. SCHAEFFER*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the Due Process Clause bar the retroactive application of a constitutional capital sentencing scheme upon resentencing of a criminal defendant whose trial occurred when a mandatory death penalty was in effect, even though such retroactive application is permitted by the *Ex Post Facto* Clause?

2. May a novel due process theory be applied on collateral review to overturn a death sentence which was final in 1979?

3. Does harmless error analysis apply to a due process violation arising from the retroactive application of capital sentencing procedures; and, if the error may not be deemed harmless, what is the appropriate remedy?

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Petitioners Jack McCormick, warden of the Montana State Prison, and Marc Racicot,[1] Attorney General of the State of Montana, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 5, 1989.

[1] Marc Racicot is the successor in office to Mike Greely, a named party in the proceedings below.

OPINIONS BELOW

The opinion of the Court of Appeals limited *en banc* panel, reported at 874 F.2d 1280 (9th Cir. 1989), is annexed as Appendix A. The withdrawn opinion of the three-judge panel of the Court of Appeals is reported *sub nom. Coleman v. Risley*, 839 F.2d 434 (9th Cir. 1988), and is annexed as Appendix B. The opinion of the United States District Court for the District of Montana, which is unreported, is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .

2. Article 1, section 10, clause 1 of the United States Constitution, in pertinent part:

> No State shall . . . pass any . . . ex post facto Law . . . .

3. Revised Codes of Montana, 1947, section 95-2206.6 to 95-2206.15 (1977) (now codified as Mont.

Code Ann. §§ 46-18-301 to 310), the full text of which appears in Appendix A at App. 23-28.

4. Revised Codes of Montana, 1947, section 94-5-304 (repealed in 1977):

> A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as a result of the criminal conduct.

STATEMENT OF THE CASE

I. Statement of the Facts.

A complete statement of the facts of the underlying offenses appears in the panel opinion of the Court of Appeals at App. 75-83. On July 4, 1974, Peggy Lee Harstad, twenty-one years old, was abducted by two hitchhikers whom she had stopped to aid. Almost two months later, her body was found on the north bank of the Yellowstone River, west of Forsyth, Montana. The investigation of her disappearance and the discovery of evidence led to the arrest of Robert Dennis Nank and Dewey Eugene Coleman, who had admitted hitchhiking together in the area of Harstad's disappearance on the evening thereof. Coleman and Nank were charged with deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. On May 7, 1975, Nank entered into a written plea agreement with the State, pursuant to which he entered a plea of guilty to deliberate homicide and solicitation to commit sexual intercourse, and agreed to testify against Coleman in return for the dismissal of the aggravated kidnapping charge, which carried a mandatory death sentence pursuant to the Revised Codes of

Montana 1947, § 94-5-304 (1974). For various reasons irrelevant to the issues herein, the State did not accept Coleman's plea offer.

At Coleman's trial, Nank testified that he and Coleman were traveling together by motorcycle when they ran out of gas between Roundup and Forsyth on the evening of July 4, 1974, and they decided to hitchhike. Peggy Harstad stopped and both men got into the car. Nank stated that he took control of the vehicle and forced Harstad into the back of the car where he attempted sexual intercourse. When Nank failed in his attempt, Coleman then forced Harstad to participate in sexual intercourse with him. Subsequently, they drove to the Yellowstone River, where Nank carried Harstad over his shoulder while Coleman came from behind and struck Harstad several times over the head with his silver motorcycle helmet. Coleman then tried to strangle her with a rope. Both men then carried her to the river. Coleman went into the river and tried to drown her. When Harstad attempted to get up, Nank went into the river to participate. Coleman held her legs and Nank held her head under the water until she drowned.

Coleman testified that Nank had hitchhiked alone while Coleman waited by the motorcycle; that when Nank returned with a car he was wet, upset and acting strange; and that Nank said he had killed a girl. Coleman testified that Nank gave him a purse and some other items and instructed him to hide them. Coleman's fingerprint was found on a piece of paper in the victim's purse. Coleman had offered three differing stories when questioned by the authorities about his whereabouts and activities on July 4, 1974.

In the course of cross-examination of Nank, Coleman's counsel pursued a line of questioning pertaining to other offenses committed by Nank. Nank testified that he and Coleman stole some rifles from a house near Roundup, Montana, on the day of Harstad's murder, and that the rifles were now in the possession of the Rosebud County Sheriff. Nank's complete testimony on the burglary is annexed as Appendix D. Coleman denied committing the burglary, first stating he was with Nank all the time in Roundup, and then stating that Nank left him for about an hour or two. Appendix E.

II. Prior Court Proceedings.

On November 14, 1975, the jury convicted Coleman of deliberate homicide, sexual intercourse without consent, and aggravated kidnapping. On November 21, 1975, the state district court sentenced Coleman to 100 years' imprisonment for the deliberate homicide, to 40 years (later reduced to 20 years) for the sexual intercourse without consent, and to death for the aggravated kidnapping. On appeal to the Montana Supreme Court, the convictions were upheld, but the case was remanded for resentencing. The Montana Supreme Court held unconstitutional Rev. Codes Mont. 1947, § 94-5-304 (1974) (repealed in 1977), providing for a mandatory death penalty for aggravated kidnapping resulting in the death of the victim. *State v. Coleman*, 177 Mont. 1, 15-16, 579 P.2d 732, 741-42 (1978) (*Coleman I*).

On remand to the state district court in 1978, Coleman was resentenced to death following a hearing on aggravating and mitigating circumstances pursuant to

Rev. Codes Mont. 1947, § 95-2206.6 to 95-2206.15 (1977), App. 23-29. The court's Findings, Conclusions, Judgment and Order of July 10, 1978, is annexed as Appendix F. The state trial court ruled that the application to Coleman of the greater procedural protections of the new sentencing statutes did not violate the *ex post facto* clause. App. 327. The court found that Coleman had no criminal record, but that he had participated in a burglary on the day of the murder. App. 329-30. Further, the state trial court concluded that an aggravating circumstance existed, that none of the mitigating circumstances were sufficiently substantial to call for leniency, and that "the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity." App. 331-32. On automatic review, the Montana Supreme Court upheld the convictions and sentences. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979) (*Coleman II*), *cert. denied*, 446 U.S. 970 (1980). Rejecting Coleman's *ex post facto* argument, the court found that the 1977 amendments were procedural in nature, that no substantial right or immunity possessed by Coleman at the time of the offense had been taken away, and that the amendments eased the rigor of the law as it existed at the time of the offense. *State v. Coleman*, 185 Mont. at 312-24, 605 P.2d at 1010-15. Coleman did not specifically argue that the retroactive application of the 1977 sentencing statutes denied him due process by virtue of the fact that evidence of the burglary became relevant to sentencing, or that he would have changed his trial strategy.

Coleman sought further relief in the Montana Supreme Court Sentence Review Division, but the petition was refused. *Coleman v. Sentencing Review Division of*

Supreme Court of Montana, 449 U.S. 893 (1980) (vacating stay of execution of death sentence and denying certiorari). Thereafter, Coleman filed a petition with the state district court for post-conviction relief, the denial of which was affirmed in *Coleman v. State*, 633 P.2d 624 (1981), *cert. denied*, 455 U.S. 983 (1982). Here, Coleman raised a due process claim in conjunction with the consideration by the sentencing judge of the Roundup burglary.

On November 19, 1981, Coleman filed his petition for a writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. § 2254. On May 11, 1982, the proceedings were stayed to allow Coleman to exhaust an unrelated issue in the state courts. *Coleman v. Risley*, 663 P.2d 1154 (Mont. 1983) (*Coleman IV*). Coleman's federal habeas corpus action then proceeded with oral argument on cross-motions for summary judgment. On August 8, 1985, the district court granted the State's motion for summary judgment and denied Coleman's motions for an evidentiary hearing and for summary judgment. Appendix C. While the petition raised a due process challenge to the consideration of the burglary evidence in sentencing, Amended Pet., Claim 19, CR 36 at 54, the district court did not specifically rule on that issue. The district court found: "Considering the brutality of the crime, it was not error for the trial judge to decide that the defendant's lack of a criminal record was not sufficiently substantial to call for leniency." App. 305. The district court further determined that the retroactive application of the 1977 statutes did not violate the *ex post facto* clause due to the significantly greater safeguards in the new statutes. App. 310-12.

Coleman lodged an appeal with the Ninth Circuit Court of Appeals on October 23, 1985. Coleman claimed, *inter alia*, that he had been denied his due process right to notice that the sentencing court intended to use uncorroborated testimony concerning the Roundup burglary as evidence at sentencing to deprive him of mitigation credit for his prior clean record. Appellant's Brief at 34-37. In his *ex post facto* argument, he asserted that in developing his trial strategy his counsel had relied on the sentencing statute as it then existed, and that he would not have cross-examined Nank regarding the burglary had he known it would later be used in sentencing. Appellant's Brief at 43-44. The three-judge panel which first considered the cause affirmed the district court judgment denying habeas corpus relief. Appendix B. The panel rejected Coleman's due process argument, reasoning that Coleman had received adequate notice that the burglary evidence would be used at sentencing. App. 127-32. The panel further held that even if Coleman were disadvantaged in this aspect of trial strategy, this Court's opinion in *Dobbert v. Florida*, 432 U.S. 282 (1977), dictated the rejection of Coleman's *ex post facto* claim. App. 86-94.

In his dissent, Judge Reinhardt argued that the retroactive application of the new sentencing scheme violated due process in that Coleman's counsel had relied upon the old statute in determining trial strategy. App. 265-75. The Court of Appeals then granted Coleman's petition for rehearing *en banc* (Order, May 12, 1988), and ordered supplemental briefing on certain enumerated questions, including whether the retroactive application of the 1977 sentencing statutes could violate due process by reason of possible changes in trial strategy. Order, May 26, 1988.

Following reargument, the Court of Appeals filed its *en banc* opinion, withdrawing the panel opinion. Appendix A. Declining to decide all other issues with the exception of a jury selection question, the Court of Appeals reversed Coleman's death sentence on the ground that he was denied due process by the retroactive application of the 1977 sentencing statutes. Sidestepping the established rule under *ex post facto* jurisprudence that a procedural change which may work to the disadvantage of the defendant is not a constitutional violation, the Court of Appeals announced that a defendant is entitled under the procedural component of the due process clause to notice of the effects his trial strategy will have on the subsequent capital sentencing. App. 18. The Court of Appeals further held that harmless error analysis may never be applied to this newly-created *"ex post facto*-type" due process violation because the error pervades the entire proceeding. App. 21.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' NOVEL DUE PROCESS THEORY EXPANDS THE *EX POST FACTO* PROHIBITION IN CONFLICT WITH DECISIONS OF THIS COURT.

In essence, the decision of the Court of Appeals created a new extension of the *ex post facto* prohibition, labeled it a "due process violation," and barred the application of the harmless error doctrine to all such errors. In fact, the Court of Appeals refused to apply the well-established doctrine developed by this Court over a period of two hundred years, beginning with *Calder v.*

Bull, 3 Dall. 386 (1798); and *Hopt v. Utah*, 110 U.S. 574 (1884); and continued in *Dobbert v. Florida*, 432 U.S. 282 (1977). Judge Wallace, in his separate concurrence and dissent, explained the potential consequences of the decision in this case as follows:

> To allow litigants to repackage their *ex post facto* challenges to ameliorative laws as due process claims requiring *per se* reversal would in effect eliminate a significant limitation in *ex post facto* doctrine.

App. 40.

While the above comment was made in the context of the harmless error issue, the Court of Appeals' decision has a broader impact because allowing criminals to "repackage" their claims under the due process clause will obliterate an entire branch of *ex post facto* jurisprudence. It has long been held that procedural and ameliorative changes, which do not affect the substantial rights of defendants, are not prohibited by the *ex post facto* clause. *Hopt v. Utah*, 110 U.S. 574 (1884); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Thompson v. Missouri*, 171 U.S. 380 (1898); *Beazell v. Ohio*, 269 U.S. 167 (1925); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Miller v. Florida*, 482 U.S. 423 (1987). This is true even though it may work to the disadvantage of the defendant. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977); *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). This Court has balanced the State interests in the administration and orderly progression of the law and the interests of the criminal defendant in a fair trial, and has reached an equitable compromise which recognizes that "[t]he inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in

force when the crime charged was committed." *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896), quoted in *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

The categories of *ex post facto* laws were set out by Justice Chase in *Calder v. Bull*, 3 Dall. 386, 390 (1798), as follows:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that *alters the legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*. [Original emphasis deleted, emphasis added.]

In addition, a law which deprives one charged with a crime of any defense available at the time of the commission of the offense is prohibited as *ex post facto*. *Kring v. Missouri*, 107 U.S. 221 (1882). Clearly, the 1977 Montana sentencing statutes do not fall into any of the enumerated categories. Similar to the situation in *Dobbert*, here the new statutes lessen the rigor of the former mandatory death penalty by giving the defendant a second chance for life with the sentencing judge, following the constitutionally approved hearing allowing the presentation of aggravating and mitigating circumstances. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The rules of evidence were not changed to the detriment of Coleman in relation to the issue of guilt or innocence of the crimes charged. It is thus clear that any use of the trial testimony

at the subsequent sentencing hearing was permissible under settled *ex post facto* principles, as a procedural change having no material impact on Coleman's substantive rights.

Ignoring these time-worn and well-reasoned principles, the Court of Appeals determined, without citation to any supporting authority, that Coleman had a due process right to notice of every detail of the procedures for sentencing so that he could plan his trial strategy accordingly. Quite obviously, the Court of Appeals simply, and with no analytical predicate, grafted an additional requirement onto the *ex post facto* analysis under the rubric of due process. This Court's ex post facto jurisprudence has already recognized the necessity for fair warning of the effect of legislation and the reliance by individuals upon the existing law. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Dobbert v. Florida*, 432 U.S. 282, 298 (1977); *Miller v. Florida*, 482 U.S. 423, 430 (1987). At the same time, the balance of interests requires the compromise noted earlier, i.e., that a criminal defendant cannot expect to be tried in all respects under the law as it existed at the time of the offense. By repackaging Coleman's *ex post facto* claim as a due process claim, the Court of Appeals has blurred the distinction between clauses of the Constitution. This radical and unprecedented departure from otherwise established constitutional standards deserves the attention of and correction by this Court.

II. NEW CONSTITUTIONAL RULES OF CRIMINAL PROCEDURE SHOULD NOT BE APPLIED ON COLLATERAL REVIEW WHERE DIRECT REVIEW OF THE CONVICTION WAS FINAL PRIOR TO THE ANNOUNCEMENT OF THE NEW RULE.

In *Teague v. Lane*, 109 S. Ct. 1060, 1074 (1989), this Court recognized that habeas corpus is a collateral remedy providing an avenue for upsetting otherwise final judgments and that "application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." A plurality of the Court held that, unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to a case which is on collateral review if direct review of the case was completed before the new rule was announced. 109 S. Ct. at 1075, 1078.

Direct review of Coleman's death sentence was completed in 1979. In resentencing Coleman, the State relied upon *Dobbert v. Florida*, 432 U.S. 282 (1977), which was the sole existing authority at the time of Coleman's resentencing and direct review. That case held that procedural and largely ameliorative changes in capital sentencing laws may be applied retroactively, even though the defendant may be disadvantaged in some manner.

Ten years later, in the decision below, the Court of Appeals adopted a new constitutional rule which was not dictated by precedent existing at the time the defendant's conviction became final. *Teague v. Lane*, 109 S. Ct. at 1070. In reaching its conclusion, the Court of Appeals relied upon *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which

held that an unforeseeable judicial interpretation of a statute defining a crime cannot be retroactively applied to bar conduct which previously was innocent. The Court in *Bouie* noted:

> If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Id., 378 U.S. at 353-54. The Court of Appeals has made an unwarranted backward leap in extending the due process theory of *Bouie* to bar the retroactive application of capital sentencing legislation, since retroactive criminal legislation has historically been governed by the *ex post facto* clause. The Court of Appeals' new rule does not fall within the two exceptions discussed in *Teague*. It does not place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and it is not a watershed rule implicating the fundamental fairness of the trial and seriously diminishing the likelihood of an accurate conviction.

Because *Teague* was not under sentence of death, this Court specifically declined to express a view as to how the retroactivity approach adopted in *Teague* is to be applied in the capital sentencing context, but did note:

> We do, however, disagree with Justice STEVENS' suggestion that the finality concerns underlying Justice Harlan's approach to retroactivity are limited to "making convictions final," and are therefore "wholly inapplicable to the capital sentencing context." *Post*, at 1081, n.3. As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant. See generally *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (*per curiam*). Collateral

> challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that "there will at some point be the certainty that comes with an end to litigation." *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting). *Cf.* U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 1987, at 9 (1988) (for the ten-year period from 1977-1987, the average elapsed time from the imposition of a capital sentence to execution was 77 months) (Table 10).

109 S. Ct. at 1077 n.3. Application of a creative due process theory in this case undermines the finality of a fourteen-year-old sentence, destroys any deterrent effect of the sentence, and makes a mockery of the criminal justice system. The *Teague* rationale logically encompasses capital sentencing matters and should preclude application of the novel due process theory created below.

III. THE OPINION INCORRECTLY AND UNNECESSARILY DETERMINES THAT AN "*EX POST FACTO*-TYPE DUE PROCESS VIOLATION" MAY NEVER BE HARMLESS.

A. Harmless error analysis is not precluded by the nature of the violation.

The Court of Appeals held that the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967), and its progeny can never apply to a denial of this newly-created due process right to advance notice of the procedures to be followed in capital sentencing. As noted by Judge Wallace in his dissent from this holding, App. 28, the Court of Appeals failed to apply this Court's recent holding in *Rose v. Clark*, 478 U.S. 570, 579 (1986):

> [I]f the defendant had counsel and was tried by an impartial adjudicator, there is *a strong presumption* that any other errors that may have occurred are subject to harmless error analysis . . . . Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." [Citations omitted, emphasis added.]

In addition, as Judge Wallace also noted, *ex post facto* jurisprudence includes an analysis similar to harmless error as part of the inquiry into whether the substantive right has been violated. App. 39-40. *Cf. Weaver v. Graham*, 450 U.S. 24, 33-34 (1981) (change in gain-time law materially disadvantageous to prisoner). Thus, the Court of Appeals decision conflicts in principle with this Court's philosophy of protecting only the substantial rights of criminal defendants.

While the Court of Appeals recognized that harmless error analysis may be applied in capital cases, App. 19, *see, e.g., Satterwhite v. Texas*, 108 S. Ct. 1792 (1988), and that this case does not involve one of the categories which this Court has determined are exempt from harmless error analysis, App. 20, the lower court determined that the effect of this novel due process violation was so pervasive that it requires *per se* reversal. The opinion details several alleged changes in trial strategy which might have occurred had Coleman known there would be a sentencing hearing on aggravating and mitigating circumstances: (1) counsel may not have elicited Nank's testimony regarding the burglary, (2) counsel may not have put Coleman on the stand, and (3) counsel may have

moved to disqualify the trial judge. It is significant to note that Coleman has never argued that he would have disqualified the judge, *see* App. 37 (Wallace, J., dissenting), and that the issue of whether Coleman would have testified is a new argument raised by his appellate counsel for the first time in the briefs before the *en banc* Court of Appeals. Whether Coleman would have testified may be analyzed from the record by answering the question of whether Coleman's testimony was necessary to rebut the direct evidence against him in order to gain an acquittal, or, stated another way, whether Coleman would have been convicted and sentenced to death in the absence of his testimony. The issue of disqualification of the sentencing judge is speculation newly injected into the case by the Court of Appeals, and for this reason should not be considered. In any event, the record discloses no attempt by Coleman to disqualify the trial judge for bias or partiality prior to the resentencing hearing. Nor is there any reflection of bias against Coleman in the record.

Coleman consistently has argued in both state and federal courts that he would not have elicited the burglary testimony. Whether this evidence affected the sentence is a question which lends itself to harmless error analysis and which can be determined from the record. *See Satterwhite v. Texas*, 108 S. Ct. at 1798 (1988). The majority opinion decides that the sentencing judge denied Coleman "any statutory credit in mitigation for not having any prior history of criminal activity," and that "[d]eprivation of this mitigating factor was critical, because it eliminated a circumstance that might have overcome the aggravating factor and allowed Coleman to avoid the death penalty." App. 15, fn.8. Its conclusion

ignores the extensive record on this point, which conclusively shows that, in the absence of disclosure to the sentencing judge of the commission by Coleman of the uncharged burglary, the resulting credit to Coleman of the statutory mitigating circumstance of "no significant history of prior criminal activity" would not have been sufficiently substantial to call for leniency. The sentencing judge in effect so stated, both in his written conclusion that "the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity," App. 332, and in his oral statement at the time of pronouncement of sentence:

> THE COURT: In pronouncing sentence I do want the parties to know that this is a decision that is extremely agonizing for the Court to make. I have not looked at the points that have been raised lightly, but many of the arguments raised by the defense, of course have been considered heretofore, and the jury have found from the factual standpoint that the defendant was guilty beyond a reasonable doubt, and I do not disagree with that conclusion of the jury. *The one mitigating circumstance is that the defendant has not prior to this time been convicted of any felony, but in the view of the enormity of the crime committed, and the Court's feeling that this one circumstance does not overcome the aggravated circumstances* I have made findings to this effect, written findings as required by the law. Also, I have made conclusions and judgment which have been furnished to the defendant and the state at this time, and I will only at this time read the Court's conclusions and judgment. [Emphasis added.]

Sentencing Tr. at 37:22-38:16. Therefore, the record on its face shows that the consideration of the uncharged burglary did not contribute to the determination that mitigating circumstances were not sufficient to call for

leniency. It has also been pointed out that the prosecution would have introduced the burglary evidence at the sentencing hearing had it not been brought out at trial. App. 87 (panel majority opinion). The fact that the prosecution was aware of the burglary may be inferred from Nank's testimony that the rifles were in the possession of the sheriff, App. 317, and from the fact that Nank had been instructed not to testify about Coleman's other crimes on direct examination. App. 320.

If harmless error cannot be determined from the record, then Judge Wallace's suggestion that an evidentiary hearing on this issue should be held in district court is the appropriate remedy. App. 28. The prosecution should be given the opportunity to prove that the error, if any, was harmless beyond a reasonable doubt.

B. Assuming arguendo that the error was not harmless, the Court's remedy is not sufficiently narrowly tailored.

Without elucidation, the Court of Appeals apparently precluded the State from conducting a new resentencing hearing and applying the 1977 capital sentencing statutes. *See* App. 69-70 (Alarcon, concurring and dissenting). This result goes far beyond the required remedy in this case. The ultimate remedy for mistakenly admitted testimony which did not affect the conviction should be a resentencing hearing in which the burglary is not considered. The ultimate remedy for an allegedly biased sentencing judge and for the wrongful consideration by the sentencer of Coleman's testimony should be a resentencing by a different judge who had reviewed the evidence admissible

for sentencing purposes. The Court of Appeals did not afford the State the opportunity to resentence Coleman to death, yet there was no ruling on whether the retroactive application of the new statutes would run afoul of the *ex post facto* prohibition. As stated by Judge Alarcon:

> [I]f the majority has silently concluded that a state may not resentence a condemned person under a statute enacted after his or her conviction, I respectfully suggest that this important constitutional issue is deserving of thoughtful discussion and critical analysis.

App. 70.

In its haste to invalidate the death sentence in this case, a sentence which Montanans through their legislators have determined to be appropriate for the severity of this crime, the Court of Appeals invented out of thin air a new due process violation requiring *per se* reversal. The opinion not only works a great injustice, but also bodes ill for future capital cases in this circuit, as the claims of criminals may be transfigured into due process claims.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

MARC RACICOT
Attorney General
PATRICIA J. SCHAEFFER*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401

*Counsel of Record

July 1989

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEWEY E. COLEMAN, *Petitioner-Appellant,* *v.* JACK MCCORMICK, Warden, Montana State Prison, and MICHAEL T. GREELY, Attorney General for the State of Montana, *Respondents-Appellees.*	No. 85-4242 D.C. No. CV-81-272-BLG OPINION

Appeal from the United States District Court
for the District of Montana
James F. Battin, District Judge, Presiding

Argued En Banc and Submitted
July 20, 1988 – San Francisco, California

Filed May 5, 1989

Before: Goodwin, Chief Judge, and Wallace, Hug, Tang, Fletcher, Alarcon, Canby, Reinhardt, Noonan, Thompson and Trott, Circuit Judges.

Opinion by Judge Thompson; Concurrence and Dissent by Judge Wallace; Concurrence by Judge Reinhardt; Concurrence by Judge Trott, joined by Judge Thompson; Concurrence and Dissent by Judge Alarcon

COUNSEL

Timothy K. Ford, Seattle, Washington, for the petitioner-appellant.

Patricia J. Schaeffer, Assistant Attorney General, State of Montana, Helena, Montana, for the respondents-appellees.

OPINION

THOMPSON, Circuit Judge:

Dewey E. Coleman, a Montana state prisoner who has been sentenced to death for the crime of aggravated kidnapping, appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We reverse his sentence of death and remand for resentencing.

I

FACTS AND PRIOR PROCEEDINGS

The facts upon which Dewey Coleman was found guilty by a jury on November 14, 1976, are fully set forth in Coleman's first appeal to the Montana Supreme Court and need not be repeated here. *State v. Coleman*, 177 Mont. 1, 579 P.2d 732 (1978) (*Coleman I*). The following are the facts relevant to the instant appeal.

Coleman, who is black, and his codefendant, Robert Nank, who is white, were charged with the crimes of deliberate homicide, aggravated kidnapping and sexual intercourse without consent, inflicting bodily injury. Nank entered a plea bargain with the State and escaped the death penalty. The State refused to enter a similar bargain with Coleman for reasons which we need not consider in this opinion. Coleman went to trial and was convicted on all counts. He was sentenced to 100 years

for deliberate homicide and 40 years on the rape charge. He was sentenced to death for aggravated kidnapping under Montana's then existing mandatory death penalty statute.[1] On appeal, the Montana Supreme Court held that the mandatory death penalty statute was unconstitutional. *Coleman I*, 177 Mont. 1, 579 P.2d at 741-42. Coleman's death sentence was vacated and his case was remanded to the trial court for resentencing.[2] Coleman was then resentenced to death in 1978 under a new Montana death penalty statute which had been enacted in 1977. Mont. Code Ann. §§ 95-2206.6-.15 (now codified at Mont. Code Ann. §§ 46-18-301 to 46-18-310; hereinafter cited in precodification version and reproduced at Appendix). Coleman's sentence was automatically reviewed by the Montana Supreme Court. Mont. Code Ann. §§ 95-2206.12-.15. The court upheld his convictions

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[1] The statute provided that "[a] court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as a result of the criminal conduct." Rev. Code Mont. § 94-5-304 (1947) (repealed 1977).

[2] Coleman's conviction on all three counts, and sentence for deliberate homicide, were affirmed. His death sentence and his sentence for sexual intercourse without consent, inflicting bodily injury were vacated. The Montana Supreme Court concluded there was insufficient evidence to show Coleman had inflicted bodily injury upon the victim in the course of committing sexual intercourse because she was murdered sometime after the rape incident. *Coleman I*, 177 Mont. 1, 579 P.2d at 742-43. On remand, Coleman was resentenced to death and was sentenced to 20 years for the crime of sexual intercourse without consent, the latter sentence to run consecutively to his sentence of 100 years for deliberate homicide. *Coleman II*, 185 Mont. 299, 605 P.2d 1000, 1007 (1979).

and sentences. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979) (*Coleman II*), *cert. denied*, 446 U.S. 970 (1980); *Coleman v. Sentencing Review Division of Supreme Court of Montana*, 449 U.S. 893 (1980) (vacating stay of execution of death sentence and denying *certiorari*).

Thereafter, Coleman filed a petition with the state court for post-conviction relief. His judgment and sentence were once again reviewed and affirmed by the Montana Supreme Court. *Coleman v. State*, 633 P.2d 624 (Mont. 1981), *cert. denied*, 455 U.S. 983 (1982) (*Coleman III*).

Coleman then filed a petiton for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Montana. This proceeding was stayed to enable Coleman to exhaust his state remedy for review of his convictions and death sentence in light of a recent discovery by his then counsel of a transcript of a pretrial hearing. The transcript revealed that during the hearing Coleman's previous counsel had made statements to the court which implied that Coleman had admitted participating in the murder after being given sodium amytal. The judge who had presided at this pretrial hearing was the same judge who later sentenced Coleman to death. Coleman's convictions and death sentence were once again reviewed and affirmed by the Montana Supreme Court. *Coleman v. Risley*, 663 P.2d 1154 (Mont. 1983) (*Coleman IV*).

Coleman then returned to the district court. He filed a motion for an evidentiary hearing on his habeas corpus petition. He sought a hearing on twelve of thirty-seven issues raised in his petition, and filed a motion for summary judgment on the remaining issues. The State also filed a motion for summary judgment. The district court denied Coleman's request for an evidentiary hearing,

denied his motion for summary judgment, and granted summary judgment in favor of the State.

II

THE CONVICTION

Jury Selection

Coleman challenges his convictions on the ground that his sixth amendment right to an impartial jury was violated. He contends his jury panel was selected in an impermissibly discretionary manner.[3]

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[3] In his dissent, Judge Alarcon contends Coleman also seeks reversal of his convictions on the ground that he was denied effective assistance of counsel, because his first attorney told the court at a pretrial hearing that Coleman had taken a sodium amytal test and had admitted participating in the crimes with which he was charged. We disagree with this characterization of Coleman's appeal. Coleman's attack regarding the sodium amytal procedure and his attorney's revelation of its results is not directed to his convictions, but to his sentence. Coleman's argument is that he was sentenced to death without due process because the results of the sodium amytal test were revealed to the judge who later became the judge who sentenced him to death. Appellant's Brief, pp. 22-24. No argument is made that this incident had any effect on Coleman's convictions. Because we reverse Coleman's death sentence on other grounds, we do not reach his sodium amytal/ineffective assistance of counsel argument.

The dissent also contends Coleman has raised an issue on appeal concerning the sufficiency of the evidence on which he was convicted. We disagree. Coleman's only argument about the evidence presented at his trial concerns the effect such evidence was given when he was sentenced to death. *See* Appellant's Brief, p. 48.

Coleman's first jury panel was dismissed by the Court three days before trial in response to a challenge by Coleman. A second panel was drawn. Each name on the jury list was assigned a number, the numbers were placed in a box, and 200 were drawn. The court then directed the court clerk to obtain a panel of sixty jurors by telephoning persons whose names were drawn from the box to see if they would be available to serve on a jury within the next three days. Sixty-one of the prospective jurors indicated they would be available and sixty appeared for Coleman's trial. *Coleman I*, 177 Mont. 1, 579 P.2d at 746-47. It was from this panel that Coleman's trial jury was chosen.

In arguing that the sixty persons making up his jury panel were impermissibly selected, Coleman alleges that potential jurors were asked whether they could appear for his trial and were allowed to excuse themselves on grounds not revealed to him. He further alleges that the system by which his panel of sixty potential jurors was selected had the disproportionate effect of placing mainly white, affluent residents from the west side of Billings, Montana on the panel. He argues that this system was controlled, not random, and resembled the so-called "key man" system of jury selection.[4]

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[4] Coleman's argument that his jury panel was selected using the key man system is without merit. The key man system of jury selection involves the selection of particular persons to make up a pool from which a jury is then chosen at random. It is not unconstitutional on its face. *Castaneda v. Partida*, 430 U.S. 482, 497 (1977); *United States v. Nelson*, 718 F.2d 315, 319 (9th Cir. 1983). Here there is nothiing to suggest the jury panel was chosen using the key man system. The

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Coleman contends that he is entitled to an evidentiary hearing on this issue. To obtain an evidentiary hearing, Coleman "must show that (1) he has alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the truth of his allegations." *Harris v. Pulley*, 692 F.2d 1189, 1197 (9th Cir. 1982), *rev'd on other grounds*, 465 U.S. 37 (1984); *see also Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir.), *cert. denied*, 105 S. Ct. 137 (1984).

A. *Lack of Showing of Distinctive Group*

Trial by a jury of one's peers contemplates that an impartial jury will be drawn from a fair cross-section of the community. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). The sixth amendment does not guarantee a randomly selected jury, *United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir.), *cert. denied sub nom. Utz v. United States*, 106 S. Ct. 592, 593 (1985), nor does it require that the jury contain representatives from every group in the community. *Lockhart v. McCree*, 476 U.S. 162, 173-75 (1986); *Thiel*, 328 U.S. at 220. A fair cross-section challenge to the constitutionality of the jury venire requires a showing:

(1) [T]hat the group alleged to be excluded is a 'distinctive' group in the community;

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initial 200 jurors were selected at random. *Cf. Castaneda*, 430 U.S. at 497. The panel of sixty potential jurors were in essence volunteers, a fact which standing alone does not render the composition of a panel unconstitutional. *Nelson*, 718 F.2d at 319.

(2) [T]hat the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) [T]hat this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

United States v. Miller, 771 F.2d 1219, 1228 (9th Cir. 1985) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

Coleman contends that as a result of the jury selection process, persons from the lower socioeconomic areas of Billings were excluded from his panel of prospective jurors. He has not alleged any facts, however, from which it could be concluded that persons from the lower socioeconomic areas of Billings formed a distinctive group in the community, or that if such a group existed it consisted of a sufficient number of persons so that its systematic exclusion from jury panels would support a fair cross-section challenge under the sixth amendment. *Duren*, 439 U.S. at 364; *see Taylor v. Louisiana*, 419 U.S. 522, 531 (1975); *United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977); *United States v. Potter*, 552 F.2d 901, 904-05 (9th Cir. 1977). Having failed to demonstrate the existence of a "distinctive" group, Coleman's claims that such a group was underrepresented in jury venires or was systematically excluded in the jury selection process also fail.

B. *Method of Selection of Available Jurors*

Coleman challenges the clerk's dismissal of 139 of the 200 potential jurors drawn from the box. There is nothing in the record, however, to suggest that the jurors who were excused by the clerk were excused for any reason

other than their inability to serve in a jury trial which was to commence in three days. *Coleman I*, 177 Mont. 1, 579 P.2d at 746. Coleman does not contend, nor does the record reveal, that the 200 names from which the 60 members of his panel were chosen do not represent a fair cross-section of the community.

The method of jury selection in Coleman's case was similar to that which occurred in *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). There, 200 to 300 jurors were selected for jury service. The defendant did not contend that these jurors were not representative of a fair cross-section of the community. The jurors were told that the trial would be lengthy and the court asked how many jurors would be able to serve. Sixty-eight jurors indicated they would be available, and sixty of these were selected for the panel. *Id.* at 321. On appeal the defendant contended the jurors consisted of volunteers and thus did not represent a cross-section of the community. *Id.* In rejecting this contention, the court concluded that the underlying complement of jurors represented a fair cross-section of the community and "[n]either the panel nor the trial jury became any the less so by reason of the technique the judge employed." *Id.* at 322. The court went on to state, "the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality." *Id.* (footnote omitted); *see also United States v. Branscome*, 682 F.2d 484, 485 (4th Cir. 1982) (grand jury); *United States v. Kennedy*, 548 F.2d 608, 611 (5th Cir.), *reh'g denied*, 554 F.2d 476 (5th Cir.), *cert. denied*, 434 U.S. 865 (1977).

Coleman did not present any affidavit or other evidence to suggest jurors were dismissed for any reason other than unavailability. His challenge to the sixty-person jury panel "consists exclusively of counsel's statements, unsworn and unsupported by any proof or offer of proof." *Frazier v. United States*, 335 U.S. 497, 503 (1948). These "conclusory allegations do not provide a sufficient basis to obtain a hearing in federal court." *Harris*, 692 F.2d at 1199.

Finally, Coleman argues in his reply brief that the trial judge improperly disqualified two jurors because of their opposition to the death penalty. He has failed to present any showing that would justify an evidentiary hearing on this issue. *Maggio v. Williams*, 464 U.S. 46, 50 (1983) (per curiam).

We conclude that Coleman's sixth amendment right to an impartial jury was not violated.

III

THE SENTENCE

Coleman challenges his sentence of death on the grounds that (a) his resentencing under the 1977 death penalty statute violated the *ex post facto* clause of the Constitution; (b) Montana's death penalty statute unconstitutionally required him to bear the burden of proof of mitigating factors; (c) his trial and death sentence, which occurred because the State refused to make the same plea bargain with him that it made with Nank, were the result of racial discrimination; and (d) he was denied due process of law when he was sentenced to death under a statute not in effect at the time of his trial. Because we

reverse Coleman's death sentence on the ground that he was denied due process in the imposition of that sentence, we do not reach Coleman's other arguments.[5]

Coleman was convicted and first sentenced to death in 1975 under a mandatory death penalty statute subsequently held to be unconstitutional in 1978 by the Montana Supreme Court in *Coleman I*, 177 Mont. 1, 579 P.2d at 741-42.[6] In 1977, the Montana legislature repealed the death penalty statute under which Coleman had originally been tried and sentenced and passed a new death penalty statute, the constitutionality of which Montana's supreme court upheld in *State v. McKenzie*, 177 Mont. 280, 581 P.2d 1205, 1228-29 (Mont. 1978), *vacated on other grounds*, 443 U.S. 903 (1979). Coleman was resentenced to death in 1978 under this new statute.

Pursuant to section 95-2206.6 of the 1977 statute (*see* Appendix), the judge who presided over the trial is also required to conduct a sentencing hearing and determine whether, under sections 95-2206.8 or 95-2206.9 of the

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[5] Both parties agree, and it is clear from the record, that Coleman has exhausted his state remedies on this issue by arguing before the Montana courts that the application of Montana's 1977 death penalty law to this case violated due process. The issue is thus properly before us on appeal.

[6] In *Coleman I*, the Montana Supreme Court held that Montana's mandatory death penalty statute was unconstitutional because "[t]here is no provision for the trial court to consider any mitigating circumstances." *Coleman I*, 177 Mont. 1, 579 P.2d at 742. The court found the requirements of the statute were inconsistent with the Supreme Court's holdings in *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Coker v. Georgia*, 433 U.S. 584 (1977) and *Roberts v. Louisiana*, 431 U.S. 633 (1977).

statute, there exist any aggravating or mitigating circumstances for purposes of determining the sentence to be imposed. Under this statutory scheme, the trial court must impose a sentence of death if it finds the existence of at least one of the enumerated aggravating circumstances, "and finds that there are no mitigating circumstances sufficiently substantial to call for leniency." Mont. Code Ann. § 95-2206.10. The aggravating circumstance relevent to this case is subsection (7) of section 95-2206.8: "[t]he offense was aggravated kidnapping which resulted in the death of the victim." The sentencing judge concluded that there were no mitigating circumstances sufficiently substantial to call for leniency, and sentenced Coleman to death. Coleman contends that, in light of the procedural framework of the revised statute, the imposition of his death sentence under it violated the due process clause of the Constitution. We agree.

We begin our analysis of this issue by noting that the Supreme Court has not to date addressed a *due process* challenge to the retroactive application of a sentencing statute that resulted in the death sentence. The retroactive application of statutes has typically been challenged as violative of the *ex post facto* clause, U.S. Const., art. I, § 10. *See, e.g., Dobbert v. Florida*, 432 U.S. 282 (1977); *Thompson v. Missouri*, 171 U.S. 380 (1898); *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982). In *Dobbert*, the Supreme Court upheld the retroactive application of Florida's capital sentencing law under the *ex post*

facto clause, but did not address the due process issue.[7] The Court in *Dobbert* reiterated the "well settled" principle that the *ex post facto* clause does not " 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.' " *Dobbert*, 432 U.S. at 293 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). As a corollary to this principle, the Court noted that "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Id.* By contrast, the procedural component of the due process clause protects individuals' rights to fundamentally fair procedures before they are deprived of their liberty rights. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). Especially in the capital sentencing arena, this court has

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[7] The Court in *Dobbert* upheld the imposition of a death sentence on a defendant who was tried and sentenced under a valid capital punishment statute even though the statute was not in effect at the time the crime was committed. The amendment to the statute came after commission of the crime but before trial. By contrast, in the present case Coleman was sentenced under an unconstitutional capital punishment statute. At least two courts have concluded that this factual distinction from *Dobbert* is decisive and have declined to resentence under new statutes defendants who were tried, convicted and sentenced under unconstitutionally defective statutes. *See Meller v. State*, 94 Nev. 408, 409 n.3, 581 P.2d 3, 4 n.3 (1978) (per curiam); *State v. Rogers*, 270 S.C. 285, 291, 242 S.E. 2d 215, 217-18 (1978); *cf., State v. Lindquist*, 99 Idaho 766, 589 P.2d 101, 105 (1979) (acknowledging factual distinction with *Dobbert* but resting decision on other grounds). Because we decide this case on due process grounds, rather than under the *ex post facto* clause as in *Dobbert*, we do not reach Coleman's *ex post facto* argument.

an obligation to scrutinize closely the sentencing procedures against "fundamental principles of procedural fairness." *See Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

When one compares the sentencing law in effect at the time Coleman was tried and sentenced with the law under which he was resentenced, it is apparent that application of the procedural aspects of the new statute to Coleman's case violated due process. Under the Montana death penalty statute which was in effect when Coleman was originally tried and sentenced, once a defendant was convicted of the crime of aggravated kidnapping, a sentence of death was mandatory. Rev. Code Mont. § 94-5-304 (1947) (repealed 1977). Montana law did not permit the sentencer to consider mitigating circumstances. Therefore, the only factor in Coleman's trial impacting whether he would live or die was whether or not he was convicted of aggravated kidnapping.

The new law under which Coleman was resentenced contains procedures which mandate what is tantamount to a second trial. This "second trial" is the sentencing hearing. The judge who presides over the guilt phase of the trial is the same judge who presides over the sentencing hearing. This judge decides whether a defendant lives or dies. Mont. Code Ann. § 95-2206.6. Evidence, regardless of its content, which came in during the guilt phase may be considered by the sentencing judge during the sentencing hearing. *Id.* § 95-2206.7.

As Coleman's counsel prepared for trial, during pretrial proceedings, and during trial, he had no idea that the decisions he was making would have any effect on a

post-trial decision by the trial judge whether Coleman lived or died. Coleman's counsel could not have known that a new law would be enacted under which the same judge who presided at Coleman's trial would preside at a subsequent sentencing hearing and would consider, among other things, Coleman's prior record of criminal activity, be it good or bad. He only knew that if Coleman were convicted of aggravated kidnapping, he would die. Thus, it made no difference during Coleman's trial whether evidence of prior criminal activity came in. Indeed, Coleman's counsel presented just such evidence on cross-examination of Coleman's codefendant, Robert Nank. He elicited testimony from Nank (which Coleman denied) that Nank and Coleman had committed a robbery on the day of the murder. Coleman's counsel brought out this testimony in an apparent attempt to discredit Nank. But would he have done so if he had known this testimony would provide evidence to negate mitigation, a circumstance which could mean the death of his client?[8] Not knowing that there would be any post-conviction death penalty hearing, how could Coleman's counsel have gauged the probative value of this evidence in

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[8] When Coleman was resentenced under the new death penalty statute, the sentencing judge stated that he was relying on the burglary to which Nank testified, and which Coleman denied, to deny Coleman any statutory credit in mitigation for not having any prior history of criminal activity. *See* Mont. Code Ann. § 95-2206.9(1). Deprivation of this mitigating factor was critical, because it eliminated a circumstance that might have overcome the aggravating factor and allowed Coleman to avoid the death penalty.

deciding whether the chance of an acquittal was so enhanced by its admission that it was worth the risk to bring it before the jury, notwithstanding the consequences it might have at a later death penalty hearing before the trial judge? Would Coleman's counsel have made the tactical decision he made? We don't know. Coleman's counsel never had the opportunity to make this choice. The choice was made for him by application of the new death penalty statute at his sentencing hearing. Coleman's trial judge became his sentencer and all of the trial evidence relevant to the newly adopted categories of aggravating and mitigating circumstances became crucial to the sentencer's decision whether Coleman lived or died.

Coleman's testimony, to which the sentencing judge referred in imposing his sentence, also impacted the sentencing judge's imposition of the death penalty. Apparently Coleman's trial counsel believed that it was necessary for Coleman to testify in order to avoid a conviction. But would he have made this same choice if he had known Coleman's testimony, not only its content but Coleman's demeanor on the stand and how he held up under cross-examination, would be considered at a post-conviction sentencing hearing on the question whether Coleman lived or died? Again, this decision, whether or not to testify in one's own defense, can only be made rationally if the consequences of such a course of action are known. Here they were not.

The new death penalty statute also impacted the delicate decision of whether to challenge the trial judge. At the time Coleman was tried, Montana permitted a party to a criminal case to remove the assigned judge

without cause. Rev. Code Mont. § 95-1709 (1949) (amended and recodified at Mont. Code Ann. § 3-1-804). Indeed, the prosecution removed the first judge assigned to Coleman's case because of a belief that he was prejudiced against the prosecution's position. Coleman might have elected to remove the next judge who was assigned the case. He did not. But he did not know that under the new statute his trial judge would become his sentencer, if he were convicted. It is one thing to accept a judge for the purpose of conducting a fair trial, and quite another to accept that judge not only to conduct the trial but to become the sole decisionmaker on the question of life or death. Coleman had no reason to consider these factors under the old law. They became relevant only under the new law. Realistically, therefore, Coleman never had the opportunity to make an informed decision whether to challenge the trial judge, and thereby prevent him from becoming the sentencer. That scenario simply did not present itself under the old law. And yet, Coleman had to bear the consequence of sentencing under the new law as if such a decision had been made.

The finality and severity of a death sentence makes it qualitatively different from all other forms of punishment. *See, e.g., Lockett v. Ohio,* 438 U.S. 586, 605 (1978) (plurality opinion). The Supreme Court has stressed the great need for reliability in capital cases requiring that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland v. Washington,* 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part); *see also California v. Ramos,* 463 U.S. 992, 998-99 (1983) ("the qualitative difference of death from all

other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination") (footnote omitted).

"The defendant has a legitimate interest in the character of the procedure which leads to the imposition of [the death] sentence. . . ." *Gardner*, 430 U.S. at 358. When human life is at stake, the need to ensure that punishment is meted out fairly and in a noncapricious manner is preeminent. *Dobbert*, 432 U.S. at 309 (Stevens, J., dissenting). The defendant is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy will have on the subsequent capital sentencing, the results of which may be equally if not more critical to the defendant than the conviction itself.

Coleman was given no notice whatsoever of the life and death consequences of his actions in defending himself against the State's prosecution before and during trial. A defendant's right to notice and to fair warning of the conduct that impacts upon his liberty is a basic principle long recognized by the Supreme Court. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *In re Oliver*, 333 U.S. 257, 273 (1948). Because Coleman had no reason to suspect that his decisions at trial would come back to haunt him at a sentencing hearing, we must conclude that he was denied due process when he was resentenced to death under Montana's revised death penalty statute.

The State argues that even if Coleman's due process rights were violated, the error was harmless. Ever since *Chapman v. California*, 386 U.S. 18 (1967), it has been the general rule that "an otherwise valid conviction should

not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The harmless error rule "recognizes . . . that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.* (citations omitted). The Supreme Court has not exempted capital cases from harmless error analysis. *See, e.g., Satterwhite v. Texas*, 108 S. Ct. 1792 (1988) (applying harmless error analysis); *Gilbert v. California*, 388 U.S. 263 (1967) (same); *see also Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987) (reversing death sentence because there was constitutional error and state did not show that error was harmless).

Chapman and its progeny have recognized, however, that the harmless error rule has exceptions. As the Court in *Chapman* observed, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23; *see id.* at 23 n.8, citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of right to counsel); *Payne v. Arkansas*, 356 U.S. 560 (1958) (introduction of coerced confession); *Tumey v. Ohio*, 273 U.S. 510 (1927) (adjudication by biased judge). Since *Chapman*, the Court has added to the list of constitutional violations which merit *per se* reversal. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 49 & n.9 (1984) (public trial); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (conflict of interest in representation throughout entire proceeding);

Faretta v. California, 422 U.S. 806 (1975) (self-representation); *Price v. Georgia*, 398 U.S. 323 (1970) (double jeopardy). In adding to this list, however, the Court has emphasized that the "errors to which *Chapman* does not apply . . . are the exception and not the rule." *Rose v Clark*, 478 U.S. 570, 578 (1986).

This case does not involve one of the categories listed above which the Supreme Court has determined to be exempt from *Chapman* harmless error analysis. In this case, the critical factor rendering violations of these rights inappropriate for harmless error analysis is the reviewing court's inability to determine whether such violations were in fact harmless beyond a reasonable doubt. *See, e.g., Satterwhite*, 108 S. Ct. at 1798 (harmless error rule applies since "reviewing court *can make an intelligent judgment* about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury") (emphasis added). Errors that either "abort[] the basic trial process . . . or den[y] it altogether," *Rose*, 478 U.S. at 578 n.6, have an effect on the composition of the record so pervasive that it cannot be determined by the reviewing court. *See also Satterwhite*, 108 S. Ct. at 1797 (errors that "pervade the entire proceeding" and whose scope "cannot be discerned from the record" require *per se* reversal); *Van Arsdall*, 475 U.S. at 681 (suggesting that errors having a pervasive effect on the factfinding *process* are not susceptible to harmless error analysis). To apply harmless error analysis under such circumstances would require the reviewing court to engage in an inquiry that was "purely speculative." *Satterwhite*, 108 S. Ct. at 1797.

Applying the foregoing principles to this case, we hold that the due process violation here is not subject to harmless error analysis. Coleman was sentenced to death under a statute not in effect at the time of his trial. The new statute added a sentencing "trial" at which the sentencing judge could consider any evidence that came in during the guilt phase. By contrast, the old statute required the death penalty once a defendant was convicted of aggravated kidnapping. Coleman's counsel made countless tactical decisions at trial aimed solely at obtaining Coleman's acquittal, without even a hint that evidence in the record would be considered as either mitigating or aggravating factors. This due process violation had a pervasive effect on the composition of the trial record. As we have already observed, Coleman's counsel might not have called his client to testify under the new statute. He might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank. He might have challenged the trial judge. It would be fruitless in this case to require trial counsel to provide a record of how he or she would have handled the case differently. The error is such that no additional evidence is needed to demonstrate that the error "pervade[s] the entire proceeding." *See id.; see also Raley v. Ohio*, 360 U.S. 423, 439 (1959) (it is impermissible in a criminal case to excuse due process violations by assuming that the defense would have acted as it did had no violation occurred). We will not affirm Coleman's death sentence by speculating that his defense counsel might have made the same pretrial and trial decisions regardless of the sentencing scheme. *See Givens v. Housewright*, 786 F.2d 1378, 1381 (9th Cir. 1986).

We, therefore, REVERSE the district court and REMAND with instructions to determine a reasonable time for the State to vacate Coleman's sentence of death on the aggravated kidnapping count. If within such time the State does not vacate Coleman's death sentence, the district court is instructed to grant the writ of habeas corpus as to the aggravated kidnapping count.[9] The opinion of the three-judge panel in this case, reported at 839 F.2d 434 (9th Cir. 1988), is withdrawn.

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[9] Coleman's contention that he was prosecuted, and sentenced to death, because of race discrimination when the state plea bargained with Nank, a white man, but refused to enter into a plea bargain with Coleman, who is black, does not impact his conviction of deliberate homicide. He would have been convicted upon his offer to plead guilty to this crime in any event. Nor does it have any disadvantageous impact on Coleman by reason of his conviction of sexual intercourse without consent, a crime different from the crime of solicitation to commit sexual intercourse to which Nank pleaded guilty. Nank's sentence for solicitation to commit sexual intercourse (Nank being the "solicitor" and Coleman the "solicitee") was 40 years. Coleman's sentence for sexual intercourse without consent, the crime he was eventually left convicted of following his first appeal, was 20 years. Both sentences were the maximums for the respective crimes. The disparity in the sentences occurred when the Montana Supreme Court struck the bodily injury element from Coleman's conviction of sexual intercourse without consent.

Coleman's racial discrimination claim, however, does impact his conviction of aggravated kidnapping, a crime to which his plea offer would not have applied. Upon resentencing, the state court will have to determine what sentence to impose on Coleman and how to treat his conviction of aggravated kidnapping in view of our reversal of his death sentence. Until Coleman is resentenced, we cannot evaluate the merits of

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APPENDIX

95-2206.6. Sentence of death – hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall

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his claim of racial discrimination based upon the state's refusal to plea bargain with him as it did with Nank.

In his dissent, Judge Alarcon states that he "do[es] not understand the majority's reluctance to face up to Mr. Coleman's constitutional attack on the judgment of *conviction* for aggravated kidnapping, deliberate homicide, and forcible rape in the appeal presently before this court. If Mr. Coleman has stated sufficient facts to show that these convictions were obtained in violation of his constitutional rights, he is entitled to an evidentiary hearing in the district court now." Alarcon, J., dissenting, p. 4740. We disagree. There is a strong practical possibility that today's decision upholding one of Coleman's principal constitutional arguments will serve ultimately to make it unnecessary for us to consider Coleman's remaining claims. While this may depend in part on Coleman's and Montana's actions following remand, it would not be appropriate for us to presume that those actions will fail to eliminate any need for this court to address further constitutional arguments.

We express no opinion as to whether Montana would be precluded from again seeking the death penalty in the event Coleman obtains a new trial. *Compare Bullington v. Missouri*, 451 U.S. 430 (1981), *and Fitzpatrick v. McCormick*, No. 878-4027, slip op. (9th Cir. Mar. 7, 1989), *with United States v. DiFrancesco*, 449 U.S. 117 (1980); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Stroud v. United States*, 251 U.S. 15 (1919); and *United States v. Andersson*, 813 F.2d 1450 (9th Cir. 1987).

conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 95-2206.8 and 95-2206.9 for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

95-22.06.7. Sentencing hearing – evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

95-2206.8. Aggravating circumstances. Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 94-5-102 and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnapping which resulted in the death of the victim.

95-2206.9. Mitigating circumstances. Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

95-2206.10. Consideration of aggravating and mitigating factors in determining sentence. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 95-2206.8 and 95-2206.9 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 95-2206.8 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

95-2206.11. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in 95-2206.8 and 95-2206.9. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

95-2206.12. Automatic review of sentence. The judgment of conviction and sentence of death are subject to

automatic review by the supreme court of Montana as provided for in 95-2206.13 through 95-2206.15.

95-2206.13. Review of death sentence – priority of review – time for review. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

95-2206.14. Transcript and records of trial transmitted. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

95-2206.15. Supreme court to make determination as to the sentence. The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 95-2206.8 and 95-2206.9; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that there was no infringement of Coleman's sixth amendment right to an impartial jury and, therefore, concur in part II of the opinion. I also agree with part III to the extent that resentencing Coleman under Montana's 1977 death penalty statute violated his due process rights. I disagree, however, with part III's statement that "[i]t would be fruitless in this case to require trial counsel to provide a record of how he or she would have handled the case differently." Maj. op. at 4701-02. Rather, I would remand for an evidentiary hearing to determine whether the due process violation was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967) (*Chapman*). As the Court recently held in *Rose v. Clark*, 478 U.S. 570 (1986), "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. . . .[I]f the defendant had counsel and was tried by an impartial adjudicator, *there is a strong presumption* that *any other errors* . . . are subject to harmless-error analysis." *Id.* at 578-79 (citation omitted) (emphasis added). Under this holding, we should apply this strong presumption in this case. I do not see how the majority has rebutted this strong presumption.

Though brought under the due process clause, Coleman's argument closely resembles an *ex post facto* claim. *See* Maj. op. at 4694. The majority would add this new kind of due process violation to the restricted list of constitutional errors which require per se reversal. *Id.* at 4700-01. According to the majority, this due process violation had so pervasive an effect on the record that we, as a reviewing court, cannot determine whether the error was harmless beyond a reasonable doubt. *Id.* at 4700-01.

I agree that the record, in its present state, cannot yield an answer to the harmless error inquiry. In my view, however, the reason for this deficiency lies in the procedural posture of this case and not in the inherent nature of the right violated. The district court entered summary judgment for the State without holding an evidentiary hearing. Had it held an evidentiary hearing and considered Coleman's due process claim, the district court could have determined whether the due process violation was harmless beyond a reasonable doubt. We then would be in a position to "confidently say, *on the whole record*, [whether] the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (*Van Arsdall*) (emphasis added).

I

Coleman's alleged prejudice could be evaluated by the district court on remand. The majority recites three specific examples of how Coleman might have been prejudiced. According to the majority, had Coleman's counsel known that his client would be sentenced under the 1977 statute, he (1) might not have called Coleman to testify,

(2) might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank, and (3) might have challenged the trial judge. *Id.* at 4701-02.

I see no reason why these (and any other) hypotheses cannot be tested in an evidentiary hearing. Coleman's counsel may well testify that, in light of other objectives, he would have called his client to the stand anyway. Even if he would not have called Coleman, it may be that Coleman's testimony was cumulative or did not contribute to the finding of any aggravating circumstance. If so, Coleman's testimony may have been harmless beyond a reasonable doubt. As for Coleman's counsel's decision to bring in evidence of Coleman's prior criminal activity, the district court might determine that the prosecutor likely would have submitted this evidence at the sentencing hearing anyway. Given this likelihood, Coleman's counsel may testify that he still would have elicited this information during Nank's cross-examination. Finally, there may have been no good reason for Coleman to challenge the trial judge. In short, there is no reason why the examples referred to by the majority could not be tested for harmless error in an evidentiary hearing. It may be that the State would fail in its burden of proving harmlessness beyond a reasonable doubt. Even so, the issue can and should be explored.

The problem here is analogous to that in many cases involving ineffective assistance of counsel claims. Such claims are disfavored when brought on direct appeal since "usually [they] cannot be advanced without the development of facts outside the original record." *United States v. Birges*, 723 F.2d 666, 670 (9th Cir.), *cert. denied*, 466

U.S. 943 (1984) and 469 U.S. 863 (1984), *citing United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978). For this reason, ineffective assistance claims are usually brought in habeas proceedings, *see United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988), where an evidentiary hearing can be used to explore "what counsel did, why it was done, and what, if any, prejudice resulted." *Id.* (citation omitted). Similarly, whether the due process violation here was harmless beyond a reasonable doubt can be resolved by inquiring into Coleman's counsel's trial decisions at an evidentiary hearing.

Tasco v. Butler, 835 F.2d 1120 (5th Cir. 1988), also provides a useful parallel to this case. Tasco allegedly had received no notice of a recidivism charge filed against him under Louisiana's habitual offender statute until the day of the sentence enhancement hearing. Like Coleman, Tasco's federal habeas petition had been denied without an evidentiary hearing. *Id.* at 1122. The Fifth Circuit held that this alleged denial of notice would constitute a due process violation. *Id.* at 1123-24. The court then applied *Chapman's* harmless error doctrine to the violation, but concluded that "[t]he record in this case leaves us in doubt concerning whether the due process deprivation affected the outcome of the sentence-enhancement proceeding." *Id.* at 1124. Accordingly, the court reversed the denial of Tasco's petition and remanded to the district court for an evidentiary hearing to determine "when in fact Tasco and his attorney first received notice of the recidivism charges," and, if the notice was insufficient, "whether the state has shown beyond a reasonable doubt that [Tasco] suffered no prejudice as a result." *Id.* Similarly, I would order a remand here.

II

Why, then, should we not remand for an evidentiary hearing? The majority suggests that per se reversal is appropriate. Rather than inquire into the reasons why the record, in its present state, will not yield an answer to the harmless-error inquiry, the majority exempts Coleman's claim from harmless-error review at all because of *the nature of the violation*.

I view as distinguishable those cases in which the Supreme Court has excepted particular constitutional errors from harmless-error review because the "scope of the violation . . . cannot be discerned from the record, [and therefore] any inquiry into its effect on the outcome of the case would be purely speculative." *Satterwhite v. Texas*, 108 S. Ct. 1792, 1797 (1988) (*Satterwhite*). The crucial characteristics of these cases appear to be (1) the scope of the violation cannot be determined from the record, and therefore (2) the effect of the violation on the outcome of the case cannot be determined. *See id.*

The cases usually included in this category are *Holloway v. Arkansas*, 435 U.S. 475 (1978) (*Holloway*) (conflict of interest in representation throughout entire proceeding), *Gideon v. Wainwright*, 372 U.S. 335 (1963) (*Gideon*) (total deprivation of counsel), and *Tumey v. Ohio*, 273 U.S. 510 (1927) (*Tumey*) (biased judge). *See Satterwhite*, 108 S. Ct. at 1797-98; *Van Arsdall*, 475 U.S. at 681-82. Before one can evaluate the differences between Coleman's due process infringement and the constitutional violations in *Holloway*, *Gideon*, and *Tumey*, however, it is necessary to understand the precise nature of the infringement in this case.

This case involves a novel type of due process claim. In challenging the retroactive application of a sentencing statute that resulted in his being resentenced to death, Coleman essentially is claiming that he was deprived of adequate notice. Maj. op. at 4699. Yet this case differs from *Marks v. United States*, 430 U.S. 188 (1977) (*Marks*) (fifth amendment due process clause), *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam) (*Rabe*) (fourteenth amendment due process clause), *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (*Bouie*) (same), and *In re Oliver*, 333 U.S. 257 (1948) (*Oliver*) (same). Those cases hold that the due process clause guarantees the right to fair warning of what conduct or actions are subject to criminal liability. *Marks*, 430 U.S. at 191; *Bouie*, 378 U.S. at 354-55 ("When a[n] . . . unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his *contemplated conduct constitutes a crime.*") (emphasis added). *Marks*, *Rabe*, *Bouie*, and *Oliver* each disallowed the retrospective application of "[a]n unforeseeable judicial enlargement of a criminal statute." *Marks*, 430 U.S. at 192, *quoting Bouie*, 378 U.S. at 353. Here, by contrast, there is no question that Coleman had adequate notice of the conduct that constituted aggravated kidnapping under Montana law. He also had adequate notice that aggravated kidnapping carried the death penalty under Montana law, though the state's mandatory provision was later struck down. *See* Maj. op. at 4686. Coleman's notice of the resentencing procedures was also adequate to prepare for the resentencing hearing itself. *See Coleman v. Risley*, 839 F.2d 434, 451-54, 460-61 (9th Cir.)

(panel opinion), *reh. en banc granted*, 845 F.2d 884 (9th Cir. 1988). Thus, Coleman was deprived of adequate notice only in the following, limited sense: by not knowing that he would ultimately be subject to the 1977 sentencing statute, he did not have adequate notice that his *decisions at trial* might have an impact on his sentencing under the new scheme. The only reasons these trial decisions could possibly prejudice Coleman is the 1977 statute's directive that the sentencing judge consider any evidence, regardless of its content, which was admitted during the guilt phase. *See* Mont. Code Ann. § 95-2206.7.

Thus, aside from one exception I will analyze later, Coleman could have been prejudiced by the retrospective application of the sentencing statute only insofar as his lack of notice *was actually reflected in the state trial record*. That is, only if Coleman's counsel introduced damaging evidence into the record at trial could lack of notice have prejudiced Coleman at the sentencing hearing. Any trial decision resulting in the failure to introduce beneficial evidence at trial could not possibly have prejudiced Coleman's sentencing, because such evidence could have been introduced at the sentencing hearing. *See id.*

Bearing this in mind, I will now apply the *Satterwhite* analysis to consider whether this type of violation is one (A) whose scope cannot be determined from the record, and therefore (B) which has an effect on the case's "outcome" that cannot be determined beyond a reasonable doubt. 108 S. Ct. at 1797.

A.

Tumey, *Gideon*, and *Holloway* all involve violations whose scope is pervasive and cannot be determined from

the record. If a judge is biased as in *Tumey*, the bias will infect all of the judge's discretionary decisions made at trial. Similarly, the total denial of counsel as in *Gideon* will result in a record that bears little resemblance to the record which would have been created with representation. In either case, it would be virtually impossible to identify those portions of the record tainted by the violation. Moreover, there are other practical difficulties which these cases present. If a judge is truly biased, it would be fruitless to conduct an evidentiary hearing examining what the judge would have done without the bias. Similarly, where counsel has been denied, it may be impossible to know who the counsel would have been and what effect he or she would have had on the trial.

Holloway presents a slightly different situation, though it too is distinguishable from this case. In *Holloway*, the Court held that whenever a trial court improperly requires, over timely objection, an attorney to undertake joint representation of codefendants with conflicting interests, the error requires automatic reversal. 435 U.S. at 489-91. In so holding, the Court wrote:

> In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a

> record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.

Id. at 490-91 (citations omitted) (emphasis in original). Thus, *Holloway* turned in part on the fact that the conflict of interest would likely have an effect on unrecorded proceedings, such as plea negotiations. This is simply not the case here. Coleman could only have been prejudiced by the retrospective application of Montana's sentencing insofar as his lack of notice was actually reflected in the state trial court record.

In a more general sense, the error here had a more circumscribed and discernible impact on the record than the violations in *Holloway, Tumey,* and *Gideon*. The set of incentives faced by Coleman's counsel in the guilt phase roughly corresponded to those presented in the sentencing phase of the later-enacted sentencing scheme. His lack of knowledge regarding the new sentencing procedure could only have prejudiced his client if it resulted in his putting into the record evidence which would have either (1) supported the finding of an aggravating circumstance, or (2) weighed against the finding of a mitigating circumstance. *See* Mont. Code Ann. § 95-2206.10. Evidence favorable to Coleman which was omitted by counsel from the trial record could always be submitted later at the sentencing hearing. Thus, the scope of the violation here was more circumscribed and easier to discern from the record.

There is only one exception in which the state trial record would not be adequate: the majority's contention that Coleman would have challenged the trial judge had he known the trial judge would have the discretion to impose the death penalty. But if Coleman's counsel had serious doubts about the trial judge's fairness or impartiality, then he likely would have requested substitution anyway. The majority argues, however, that "[i]t is one thing to accept a judge for the purpose of conducting a fair trial, and quite another to accept that judge . . . to become the *sole decisionmaker* on the question of life or death." Maj. op. at 4698 (emphasis added). This argument overestimates both the amount of discretion accorded the sentencing judge under Montana law and the willingness of Coleman's counsel to endure a biased judge for the trial but not the sentencing phase. Furthermore, Coleman himself has never suggested to this court that he would have challenged the trial judge. Rather, this hypothetical scenario is a product of the majority's quest to conjure up ways in which Coleman might have been harmed. In my view, this contention's origin provides all the more reason why it should be tested at an evidentiary hearing. Such a hearing would supplement the trial record and provide an adequate basis for harmless error analysis of this contention. Just because Coleman's counsel *could* have challenged the trial judge without cause, *see* maj. op. at 4697-98, does not necessarily mean that we should automatically assume he would have done so, or that, had he done so, the outcome necessarily would have been different.

B.

It might be argued that where the "outcome" is a death sentence, harmless error analysis is never applicable. The Supreme Court has rejected this view, and has repeatedly applied harmless error analysis to capital sentencing proceedings. *E.g.*, *Satterwhite*, 108 S. Ct. at 1797-98; *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (reversing death sentence because there was constitutional error and state did not show error was harmless); *Skipper v. South Carolina*, 476 U.S. 1, 7-9 (1986) (*Skipper*) (implicitly rejecting idea in concluding that error was not harmless). In *Satterwhite*, the Court held that "a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." 108 S. Ct. at 1798. By contrast, *Skipper* evaluated the harmfulness of the *exclusion* of particular mitigating evidence from the capital sentencing phase. 476 U.S. at 7-8.

Turning to whether the "outcome" in this case can be determined beyond a reasonable doubt, I believe that Montana's sentencing procedure channels the sentencing judge's discretion in such a way that a reviewing court can evaluate the effect of Coleman's due process violation on the sentence imposed. The sentencing determination under Montana law is based on the presence or absence of statutorily defined mitigating and aggravating circumstances. Mont. Code Ann. § 95-2206.8-.9. Moreover, if the death penalty is imposed, the sentencing judge must make specific written findings of fact regarding the presence or absence of each of the aggravating and mitigating circumstances. Mont. Code Ann. § 95-2206.11. These findings must be "substantiated by the records of the trial

and the sentencing proceeding." *Id.* Under this regime, the impact of the error is more readily ascertainable than when the reviewing court must judge the error's impact on the jury's final, unexplained decision of guilty or innocent. Similarly, the impact under the Montana capital sentencing procedure is more easily determined than under proceedings in which a jury makes the capital sentencing determination without making specific written findings. *See, e.g., Satterwhite,* 108 S. Ct. at 1795, 1797-98 (applying harmless error review where capital sentencing jury answers two statutorily prescribed questions); *Skipper,* 476 U.S. at 2-3, 7-9 (implicitly applying harmless error review where capital sentencing jury returns final, unexplained decision whether to execute). If harmless error review could be applied under the schemes in *Satterwhite* and *Skipper,* then *a fortiori* we could apply it to the Montana procedure.

Moreover, this approach makes sense for one additional reason which is worth pointing out. Treating *ex-post-facto*-type due process violations as requiring automatic reversal would make little sense in light of *ex post facto* jurisprudence. Under that body of law, neither a procedural nor an ameliorative change in the law is actionable. *Dobbert v. Florida,* 432 U.S. 282, 292-97 (1977). Here, the change in the Montana law appears to have been both procedural and ameliorative. The determination under the *ex post facto* clause whether the challenged law is ameliorative is the functional equivalent of a harmless error analysis. Thus, under the *ex post facto* clause, as part of the inquiry into whether the right has been violated, courts examine whether the claimant was disadvantaged or harmed by the change in law. *See* 3 W.

LaFave & J. Israel, *Criminal Procedure* § 26.6 at 59 (1988 Supp.) (describing category of cases "characterized by a finding of prejudicial impact in the determination that there was a constitutional violation" and stating that "[w]here a court has made such a finding . . . (as where it concludes that counsel's representation was ineffective under the *Strickland [v. Washington*, 466 U.S. 668 (1984)] standard, or that nondisclosed exculpatory evidence was material under the [*United States v. Bagley*, 473 U.S. 667 (1985)] standard), then there is no reason to superimpose the *Chapman* standard to determine whether a new trial is necessary"). To allow litigants to repackage their *ex post facto* challenges to ameliorative laws as due process claims requiring per se reversal would in effect eliminate a significant limitation in *ex post facto* doctrine.

III

For the foregoing reasons, I would hold that the due process violation in this case is subject to harmless error analysis. I express no opinion whether the error was in fact harmless beyond a reasonable doubt. I would remand to the district court for an evidentiary hearing.

REINHARDT, Circuit Judge, concurring:

Today, more than thirteen years after a state court levied an unconstitutional death sentence against Dewey Coleman, a federal court has invalidated that punishment. While the majority properly considers only one of Montana's unlawful acts, the fact remains that the state's prosecutors and courts committed a series of errors that are extraordinary both for their breadth and their

egregiousness.[1] The history of Montana's unrelenting effort to hang Dewey Coleman illustrates not only the failings of our legal system but also its saving graces. In a more perfect world, Dewey Coleman would not have lived under a death sentence for over a decade, and protracted litigation would not have sapped the limited resources of state and federal courts. In a less perfect world, a court system that had grown impatient with his numerous appeals would already have overseen Dewey Coleman's execution.

I write separately today not to repeat any of the arguments thoughtfully presented for the court by Judge Thompson. I concur without reservation in his opinion. I add my additional comments only in order to point out that the case of Dewey Coleman illustrates the fact that curtailing the federal habeas corpus procedures in death penalty cases would seriously undermine our system of justice and our commitment to constitutional values.

I.

In 1975, Coleman was sentenced to death for the crime of aggravated kidnapping. Constitutional error riddled the proceedings.[2] Despite glaring deficiencies, it was

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[1] *See Coleman v. Risley*, 839 F.2d 549, 615 (9th Cir. 1988) (Reinhardt, J., dissenting) (discussing those errors in detail).

[2] The constitutional problems can be roughly divided into four categories of error: the Equal Protection Clause, sentencing procedures, due process, and cruel and unusual punishment. First, Montana's decision to refuse plea bargaining and

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not until after thirteen years and thirteen court proceedings that we finally granted relief.[3] Dewey Coleman's

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seek a death sentence raises serious questions of racial bias and discriminatory intent concerning which Coleman has been unable to obtain an evidentiary hearing. While the State offered Coleman's white codefendant, a hardened criminal, a life sentence, Montana refused to negotiate in good-faith with Coleman – who is black – despite his lack of a criminal record or a violent past, the difficulty in prosecuting a case built almost entirely on the testimony of a confessed murderer, and substantial doubts as to his guilt. Second, during the capital sentencing phase, Coleman was denied an opportunity to present oral argument. The trial court, by formulating, writing, and distributing its final order prior to the sentencing hearing, abdicated its constitutional duty to provide the defendant a fair hearing. The trial court also unconstitutionally based Coleman's sentence on an unadjudicated offense. Third, Coleman was forced, by statute, to carry the burden of persuasion on the existence of mitigating circumstances and on the issue of whether these mitigating circumstances outweighed the aggravating circumstances, turning the normal method of proof on its head. Fourth, Coleman was ultimately sentenced to death under a new death penalty statute that was passed after he had been tried, convicted, and sentenced under an unconstitutional statute. *See* Maj. op. *passim*. Finally, an adjudication of guilt based only upon the dubious and self-interested testimony of a confessed murderer and the minimal physical evidence present here is constitutionally insufficient to support a capital sentence. *See Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion). In sum, serious constitutional error affected almost every aspect of this case, from the passage of the initial Montana death penalty statute to the imposition of the current death sentence.

[3] Coleman was first convicted and sentenced to death by the Sixteenth District Court of Montana in 1975. The Montana Supreme Court vacated that sentence three years later. *State v.*

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experience is not atypical for a death row inmate seeking constitutional relief. Many prisoners spend more than a decade on death row before federal courts vindicate their years of litigation. *See infra* § III. These peripatetic passages through our legal system have raised serious questions about both habeas corpus and the practicality of the death penalty. Critics of the former have argued that the extended process undermines judicial finality and threatens the efficient functioning of the federal courts.[4] Some have even suggested that the writ be streamlined or abolished.

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Coleman, 579 P.2d 732 (1978) (Coleman I). On remand, Coleman was again sentenced to death. The Montana Supreme Court affirmed. *State v. Coleman*, 605 P.2d 1000 (1979) (Coleman II). After the United States Supreme Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Montana Supreme Court reheard argument and again affirmed. *See* Coleman II. The United States Supreme Court denied certiorari. *Coleman v. Montana*, 446 U.S. 970 (1980). In early 1981, the Sixteenth District Court of Montana refused post-conviction relief. The Montana Supreme Court affirmed. *Coleman v. State*, 633 P.2d 624 (1981) (Coleman III). The United States Supreme Court denied certiorari. *Coleman v. Montana*, 455 U.S. 983 (1982). Thirteen months later, Montana's highest court rejected Coleman's state habeas corpus petition. *Coleman v. Risley*, 663 P.2d 1154 (1983). On August 9, 1985, the United States District Court denied Coleman's petition of habeas corpus. A divided three judge panel of this circuit affirmed. *Coleman v. Risley*, 839 F.2d 434 (9th Cir. 1988).

[4] The genesis of this hostility towards habeas appeals stems in part from a widely shared misperception of a habeas explosion. *See* Smith, *Title 28, § 2255 of the U.S. Code*, 40 Notre Dame Law. 171, 175-76 (1964) (listing filing statistics to demonstrate 'abuse' of the writ). Statistics do not support this picture

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> I do not think that . . . [the Supreme Court] . . . can continue to evade some responsibility for this mockery of our criminal justice system. Perhaps out of a desire to avoid even the possibility of a "Bloody Assizes," this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the

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of a beleaguered federal judiciary. Since separate habeas statistics were first compiled in 1971, the number of claims per prisoner has steadily declined. Although growth in the overall prison population has off-set this per capita decline, there has also been a steady growth in the number of federal district court judges and magistrates. Over a long-term perspective – since 1944 – the burden on the federal courts of successive habeas petitions has increased, but "the rhetoric of the boom has outlasted the reality. . . .prisoner's habeas petitions have declined, and that decline began in the early 1970's, long before the major cases and rules restructuring habeas relief were in place." Resnick, *Tiers*, 57 So. Cal.L.Rev. 837,950 (1984). In 1971, at their peak, habeas petitions occupied over 12% of the federal docket; that number dwindled to 5% twelve years later. In addition, while 6.1% of all civil cases reach trial, only 2.4% of habeas cases proceed to the trial stage. *Id.* at 947, *citing* Annual Report of the Director of the Administrative Office of the United States Courts 60 (1982). Thus, the evidence does not support the portrait of a federal judicial system tottering under the weight of successive habeas papers. On the other hand, *death penalty* habeas cases raise questions of a different magnitude. The severity of capital punishment mandates greater scrutiny of the merits of death row appeals. Since questions of death penalty law often involve complex factual and doctrinal inquiries, death penalty petitions – unlike many other habeas cases – are more likely to survive motions to dismiss or other summary motions. Consequently, these complex questions, fueled by recent expansions in the death penalty, demand a significant amount of the federal courts' attention. *See infra* § IV.

> Federal Government into arcane niceties which parallel the equity court practices described in Charles Dickens' "Bleak House".

Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari). I agree with Chief Justice Rehnquist that there are lessons to be gleaned from the federal habeas experience in death penalty cases; but because I believe that the substantial constitutional issues raised by defendants such as Dewey Coleman are much more than "arcane niceties", I would conclude that the mockery of our criminal justice system lies not in repetitive federal review but in the persistent disregard by our courts of fundamental constitutional rights.

II.

No analysis of the habeas process is complete without consideration of its historical background. The story of the Writ of Habeas Corpus begins with the birth of the English Common Law. *See* C. Antieau, *The Practice of Extraordinary Remedies* 1 (1987). The Great Writ "is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." *Secretary of State for Home Affairs v. O'Brien*, 1923 A.C. 603, 609 (H.L.). Its lineage in American jurisprudence is no less august, extending from the earliest days of colonial law through the Constitution[5] to modern

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[5] "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2.

times. Although in form simply a method of procedure, the writ of habeas corpus has long stood as a bulwark against arbitrary and illegal imprisonment; "its history is inextricably intertwined with the growth of fundamental rights of personal liberty." *Fay v. Noia*, 372 U.S. 391, 401 (1963). In many ways, the history of the Great Writ is the history of constitutional liberty in this country.

The historical role of federal habeas review of state proceedings has been more limited. The contours of federal habeas jurisdiction were sketched in the first days of the new country but were not significantly expanded until the Judiciary Act of 1867.[6] The reach of the writ into state prisons has varied with the ebb and flow of Supreme Court jurisprudence. The *Noia* Court extended the Great Writ deep into state court adjudication, but recent cases have invoked procedural doctrine to bar certain claims in federal court. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977) (adopting the cause and prejudice test for unlitigated state claims). These erosions of the Great Writ, however, have not robbed it of its essential value. "If the States withhold effective remedy, the federal courts have the power and the duty to provide it." *Noia*, 372 U.S. at 441. Habeas corpus process over state

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[6] The extent of this nineteenth century expansion has been hotly debated by courts, *compare Noia*, 372 U.S. at 415-19 with *Stone v. Powell*, 428 U.S. 465 (1976), and by academics, *compare* Peller, *In Defense of Federal Habeas Corpus Litigation*, 16 Harv. C.R. – C.L. L. Rev. (1982) (extended to the limits of the Constitution) with Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (limited to attacks on state court jurisdiction).

incarceration still stands as a basic safeguard of our liberties.[7]

III.

While the historical role of the writ of habeas corpus illustrates its significance in American law, modern practice underscores the need for its continued vitality. Dewey Coleman's passage through the Montana judicial system symbolizes a problem plaguing death penalty litigation generally. Between 1976 and 1983, of the 41 death penalty cases decided by the Courts of Appeals on the merits, the prisoner prevailed 30 times, or almost 75% of the time. *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting). "This record establishes beyond any doubt that a very large proportion of federal habeas corpus appeals by prisoners on death row are meritorious, even though they present claims that have been unsuccessful in the state courts, that this Court in its discretion has decided not to review on certiorari, and that a federal district judge has rejected." *Id.* To protect the rights of capital defendants, the Supreme Court has erected a complex structure of procedural and substantive rules. However, these protections, often casually treated by state courts, would be rendered virtually meaningless if federal habeas were to disappear. The statistics show convincingly and the experience of Dewey Coleman illustrates that any curtailment of the writ of

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[7] Some of the most influential civil rights decisions of our time have resulted from habeas corpus petitions filed by state prisoners. *See e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964)

habeas corpus would be tantamount to federal collaboration in a scheme to deny death row inmates their constitutional rights.

Critics have charged that the high rate of successful habeas appeals signals not an inability of state courts to adjudicate constitutional rights but rather heightened sensitivity of federal courts to death row inmates. While it is true that the federal courts scrutinize death penalty appeals more closely than other cases, the judiciary is doing nothing more than following established constitutional doctrine. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). I find it troubling that the most determined attacks on the habeas process have come in an area of litigation where the stakes are so high, and the cost of error equals a man's life.

It is difficult to disagree with the Chief Justice that the results of death penalty litigation threaten to make a mockery of the criminal justice system. However, it is not frivolous appeals or complicitous judges that shake confidence in fair adjudication; rather, "it is difficult to avoid the suspicion that our criminal justice system impeaches its own integrity by producing reversible errors in between half and three-quarters of its [death penalty] cases." Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741, 1793 (1987). When

state court judges ignore fundamental principles of constitutional law,[8] the basic premises of the judicial system are shaken; the vast array of errors encourages speculation about the impartiality and detachment necessary to fair adjudication. This case is a prime example. The Montana Supreme Court had a number of opportunities to correct what amounts to a primer of constitutional error: race and equal protection, due process, cruel and unusual punishment. Yet, the majority of the court failed to do so and experienced little difficulty in rejecting Coleman's claims.[9] Given the unwillingness or inability of some

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[8] The high state court error rate stems from several sources. First, despite Justice Powell's protestations to the contrary, *see Stone v. Powell*, 428 U.S. at 493 n.35, experience suggests that federal courts stand in a better position to adjudicate constitutional rights. This may be a function of greater receptivity of federal courts to Supreme Court dictates, insulation from majoritarian pressures, and even superior technical competence. *See generally* Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). The recent experience of California's Supreme Court forcefully shows that the system of direct election of judges can impose public opinion upon 'politically-neutral' constitutional interpretations. Second, mere redundance of federal review of state imprisonment poses a formidable barrier to high error rates. Each successive decision diminishes the possibility of unconstitutional executions. For the mathematics of redundancy, *see* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1045 (1977).

[9] In *Coleman I*, the court, squarely faced with a recent controlling United States Supreme Court precedent, was compelled to correct an earlier constitutional violation in the initial sentence. 579 P.2d at 741-42. Thereafter, the Montana Supreme

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state courts to vindicate federal constitutional rights, habeas review of their judgments remains a necessary, as well as desirable, element of our federal system.

IV.

While disagreements over the death penalty habeas process continue to fester, both proponents and opponents of the death penalty agree on at least one issue, that death penalty litigation threatens effective administration of the law. Unlike many habeas cases which can be disposed of on the pleadings, *see supra* n.4, the gravity of capital cases coupled with the startling high rate of state error mandates intensive federal scrutiny. Dewey Coleman's case is again illustrative. Over seven years has passed since a habeas petition was docketed with the federal district court for Montana; both a three judge and an en banc panel of this court ultimately subjected his claims to intense review.[10] This single case tied up significant federal resources over the last seven years, and there are two hundred more potential death penalty litigants living on death row in California alone. Across the country, the number of potential petitioners has grown rapidly. At the beginning of 1985, there were 1420 inmates on

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Court had three opportunities to correct the fundamental constitutional errors raised in the habeas petition. In all three instances, the majority incorrectly denied relief.

[10] The majority and dissenting opinions of the three-judge panel cover 90 pages in the federal reporter. 839 F.2d at 434-523. While I am not certain that mere volume is a perfect indicia of the extent of judicial scrutiny, I suspect that there is, on some occasions at least, a basic correlation.

death row in the United States; by the end of the year, 171 prisoners had been added to the executioner's ledger. By March, 1987, 1,874 inmates languished on death row, an increase of approximately 32% over a 2½ year period. *See* Bureau of Justice Statistics, U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 1986 at 428-29 (1987). This increase in the number of death row inmates will be reflected in the number of habeas petitions. In fiscal year (FY) 1988, the number of new death penalty cases entering the federal court system is estimated to be approximately 300. In FY 1989, an estimated 345 more death row inmates will file habeas petitions in the federal courts. In FY 1990, we can expect another 425 habeas petitions to flood the district courts. *See generally* Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases (1988); Spangenberg Group, Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989 (1988).[11] Because of California's frequent invocation of the death penalty, the Ninth Circuit will bear a substantial part of the burden. An estimated 76 new death penalty cases will confront this court in 1989, and the number of the new entrants will rise to approximately 95 in 1990. *Id.* If we properly review these habeas petitions, we will be unable to handle our ordinary calender of civil and criminal cases in an efficient and orderly manner.

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[11] The Spangenberg Group's projections of habeas corpus petitions in the federal court system derive from a 50 state survey of Attorney General's Offices and Public Defender's statistics. The estimates closely match the figures compiled by the NAACP.

Since it takes an average of over seven years from the date of sentencing to properly adjudicate a death penalty claim, collateral attacks on capital sentences will create a massive backlog in the federal system. Given the nature of the punishment and the high rate of state court errors, the federal courts must continue to scrutinize these cases with utmost care. But the costs of the fair and accurate adjudication mandated by the Constitution are extremely high; the limited capacities of the district and circuit courts will be challenged, and the ability of the federal system to handle the pressing business of other litigants will be diminished. As long as capital punishment is condoned in our country, extensive review of the death penalty must remain a priority of the federal courts, but, as the figures indicate, this mandatory review will exact a price in the impaired administration of our civil and criminal dockets.

V.

In 1975, Dewey Coleman was sentenced to death; while state and federal courts debated the merits of his claim, he languished on death row for over thirteen years. A great deal of time, effort, and money, both public and private, has been expended, but the fact that this case has finally been adjudicated properly makes the process worthwhile.[12] I realize that there are other values – such

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[12] I am confident that the death penalty litigation in Coleman's case has now drawn to a close. Although the majority opinion properly does not reach the hypothetical question whether a new death sentence could be imposed if Coleman

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as finality – that are important to the judicial process, but when the stakes are a man's life, these values pale in comparison to accurate and fair adjudication. If cumbersome administration of the death penalty threatens efficient handling of all other civil and criminal matters, and some changes must therefore be made with respect to death penalty cases, the answer lies not in restricting legitimate appeals but in rethinking the social utility of the death penalty. Until legislatures reassess the wisdom of capital punishment[13], exacting scrutiny of capital cases

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sought and obtained a new trial and was again convicted, I think the answer to the question is plain. As Judge Thompson eloquently writes for the en banc court, "Because Coleman had no reason to suspect that his decisions at trial would come back to haunt him at a sentencing hearing, we must conclude that he was denied due process when he was resentenced to death under Montana's revised death penalty statute." Majority Op. at 4699. The reasoning is necessarily applicable to any future death sentence imposed on Coleman for the crimes on which he has heretofore been tried. The record of the first trial can never be undone. Any future trial decisions Coleman would make would inevitably be affected by the trial record his counsel has already created.

[13] Among Western nations, retention of the death penalty is a rarity. In Western Europe, eight countries nominally keep death penalty statutes on the books. In five of those nations – Italy, Malta, Spain, Switzerland, and England – the laws permit capital sentences only for exceptional crimes, such as wartime treason. The other three – Belgium, Greece, and Ireland – retain the death penalty for ordinary homicide. But not one of the eight countries has executed a prisoner within the last decade. *See* Amnesty International, Death Penalty List of Abolitionist and Retentionist Countries (1988). Clearly, the process of reassessment has taken a different turn in other developed societies.

will continue to be the duty of the federal courts. And as long as state courts unconstitutionally sentence defendants to death, the only choice allowed by our laws is for the federal courts to put their judgments to the highest tests of the Constitution.[14]

TROTT, Circuit Judge, joined by Circuit Judge THOMPSON, concurring:

Peggy Lee Harstad was viciously murdered on July 4, 1974. That this case is still being litigated over fourteen years later does not speak well of our system of justice. The prolongation of such a matter can only have the effect of preventing her family, friends, and community from coming to peace with this horrendous event–if that is possible. Litigants, too, deserve speedier results. All of us responsible for the anemic pace of justice should reflect on every ramification of this delay and rededicate ourselves to doing everything within our power to make sure that difficult and important decisions that are committed to us are made as expeditiously as possible. As Chief Judge Clark said in *Brogdon v. Butler*, 824 F.2d 338, 343 (5th Cir. 1987) (Clark, C.J., concurring), "Justice requires that in each instance capital punishment be imposed with maximum assurance of scrupulous legality.

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[14] It would, of course, be inappropriate to comment here on the recently enacted federal legislation which provides for the imposition of the death penalty in certain cases. *See* Title VII of the Anti-Drug Abuse Act, P.L. 100-690. No case has yet been decided under that statute.

But, justice equally demands an assurance that such punishment be imposed when the minds of men still retain memory of the crime committed."

I agree with Judge Reinhardt's assessment of the enormous and taxing death penalty workload that looms on the horizon. I respectfully disagree, however, that workload is a reason to rethink the social utility of the death penalty. Where it is the law, it represents the people's views expressed through democratic institutions regarding the appropriate punishment for the most heinous of criminal acts. Rather than surrender to the challenge of handling these difficult cases with judicious alacrity, I find it preferable to expand or streamline the system to handle the load.

I also must take issue with my colleague's statement that Montana's prosecutors and courts necessarily committed "a series of errors that are extraordinary for their breadth and egregiousness." It is useful to put this case in context to remember that Coleman at one point tried to plead guilty while simultaneously proclaiming he was the innocent victim of racial bias. Then, after the administration of "truth serum," a drug known on occasion to produce unreliable results, his attorney abruptly indicated Coleman was prepared to admit to his part in the kidnap, rape, and murder. With this series of events in mind, it is not appropriate to reject summarily a state prosecutor's explanation for his reluctance to accept a plea of guilty from a man who first said he was innocent, then in an abrupt, about-face apparently said he was guilty (after being given sodium amytal), and finally went to trial on the theory that he was blameless. Many

respected trial judges might well have declined to accept such a plea because of its obvious defects.

Had Montana accepted either of Coleman's pleas, it is clear beyond cavil that Coleman would have eventually mounted a collateral attack against his conviction, claiming an innocent black man under the influence of drugs had been coerced into pleading guilty and sent to jail for life for a crime he did not commit. Had he been successful in invalidating such a plea, Montana would have had to try Coleman years later with evidence that might have deteriorated beyond resurrection. Had Nank died or escaped in the interim, Montana's case might have been nonexistent, and Coleman might have escaped trial altogether. This would have been unacceptable. It is therefore not beyond understanding that the State refused to plea bargain and opted instead to go to trial.

Montana was under no obligation to plea bargain at all. *See Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). Also, a plea tendered pursuant to *North Carolina v. Alford*, 400 U.S. 37 (1970) will not stand–nor should it–without a strong factual basis and a clear showing that it was the product of a free will. Montana's Hobson's choice under these difficult circumstances to put its case before a jury, therefore, is hardly conclusive grounds for castigation. As the Supreme Court noted in *Singer v. United States*, 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630, 638 (1965), our Constitution regards a trial by jury as the best way to produce a fair result. The cruel and savage facts in this case also make it evident that Montana's selection of capital punishment falls short of shocking a reasonable

person's conscience. *See Burger v. Kemp*, 107 S.Ct. 3114 (1987).

I concur generally in Judge Thompson's analysis of the due process problem in this case, but only as it relates to the issue of Coleman's present sentence. Because of the procedures in place at the time of the commencement of Coleman's trial in October 1975, his counsel was required to make important tactical decisions without being able to gauge their impact on a nonexistent post-conviction death penalty hearing. Anyone familiar with death penalty cases knows the issues confronting defense counsel highlighted by Judge Thompson are real. This is not a matter of speculation. The law in Montana had not yet provided for a separate hearing on the issue of punishment and did not do so until 1977. It is for this reason that Coleman's sentence must be reversed.

Judge Wallace in his concurring and dissenting opinion makes a very strong case for an evidentiary hearing on the issue of whether the due process violation was harmless beyond a reasonable doubt. Were it not for the fact that Coleman's counsel himself brought Nank and Coleman's involvement in a robbery to the attention of the jury, I might agree. But this makes it virtually certain in my judgment that the error cannot be said to have been harmless beyond a reasonable doubt.

In one sense, this case is a victim of the turbulence generated in 1972 by *Furman*. New procedural guidelines for the administration of capital punishment were mandated. Virtually every state where capital punishment was on the books, including Montana, had to amend its laws to conform to the new rules. This took time. The

choices were difficult, the drafting complex. The Supreme Court provided little guidance. Many cases, including this one, suffered as a consequence. That the path is difficult, however, is not sufficient reason to abandon a constitutional avenue chosen by the people. As an ancient Greek philosopher once said, "It is a painful thing to look at your own trouble and know that you yourself and no one else had made it." Sophocles, *Ajax* (c.447 B.C.)(John Moore trans.).

ALARCON, Circuit Judge, concerning in part and dissenting in part:

I concur in that portion of the majority's opinion that holds that the record does not support Mr. Dewey Coleman's claim of a violation of his right to an impartial jury at the guilt phrase of his trial. I dissent from the majority's conclusion that Mr. Coleman's claim, that he was selected for prosecution and convicted solely because he is a black man, need not be resolved in this appeal. If Mr. Coleman was selected for prosecution and convicted in violation of his right to equal protection, any question concerning the validity of the punishment later imposed by the sentencing court would clearly be moot. The majority has not explained why it determined that it was required to reach Mr. Coleman's contention that the jury that *convicted* him was improperly selected while, at the same time, apparently concluding that it was unnecessary to decide the remainder of his constitutional challenges to the *guilt* phase of the trial.

I

Mr. Coleman, a black man, has asked this court to order the district court to grant him an evidentiary hearing so that he may offer evidence in support of his contention that he was invidiously subjected to selective prosecution, represented by ineffective counsel, and convicted of three crimes based upon legally insufficient evidence, notwithstanding his innocence, in violation of his federal constitutional rights. In a brief and enigmatic footnote, the majority has expressly declined to review the merits of these serious constitutional challenges, which, if true, should entitle him to a new trial if not immediate freedom from further incarceration. The majority appears to have ignored the Supreme Court's instruction that in considering a capital case "the severity of the sentence mandates careful scrutiny in the review of *any colorable claim of error.*" *Zant v. Stephens*, 462 U.S. 862, 885 (1983)(emphasis added). Because I believe that the failure of the majority to determine the merits of each of Mr. Coleman's allegations of grave constitutional error concerning the *guilt* phase of his trial may result in the continued confinement of a state prisoner – who may be innocent – for the rest of his life, I cannot join in the majority's advisory opinion concerning the validity of the punishment imposed for the commission of *one* of these crimes.

II

Over thirteen years ago, Mr. Coleman was convicted by a Montana jury of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, with

bodily injury (forcible rape). He is presently serving a sentence of 100 years for deliberate homicide and a consecutive sentence of 20 years for forcible rape. *Coleman II*, 185 Mont. 299, 605 P.2d 1000,1007 (1979). He also received a sentence of death for the crime of aggravated kidnapping.

Mr. Coleman claims that he is innocent and was selected for prosecution and convicted solely because he is black. The Montana courts refused to grant Mr. Coleman an opportunity to prove that he is the victim of selective prosecution and other serious constitutional violations which if true, would compel reversal of his convictions and the restoration of his freedom. Having exhausted his state remedies, Mr. Coleman exercised his rights under 18 U.S.C. § 2254 to petition the federal courts to hear his evidence that he was selected for prosecution and convicted solely because he is a black man.

The district court dismissed Mr. Coleman's petition without a hearing. A three-judge panel of this court heard Mr. Coleman's appeal from the denial of his petition for a writ of habeas corpus. Two of the judges concluded that the record failed to support Mr. Coleman's contention that "he was tried, convicted, and sentenced to death as a result of pervasive racial discrimination." *Coleman v. Risley*, 839 F.2d 434, 450 (9th Cir. 1988). Our dissenting colleague was of the view that Mr.Coleman was "entitled at the least, to a full and fair hearing on [the equal protection claim] in the district court." *Id.* at 482. In a subsequent passage, the dissent argued that "where the defendant establishes a prima facie case of racial discrimination, we have an obligation to conduct a hearing and probe the motives of the prosecution." *Id.* at 483.

Mr. Coleman petitioned for a rehearing and suggested that such reconsideration should be conducted by an en banc panel of this court. He again argued that the record of the state court proceedings amply demonstrated that he was entitled to an evidentiary hearing to prove that he was selected for prosecution and convicted because he is black. We granted rehearing en banc.

In its opinion, the en banc majority has failed to determine the merits of Mr. Coleman's contention that he is entitled to an evidentiary hearing to prove he was selected for prosecution and convicted solely because of his race. Instead the majority has limited its review to a discussion of the validity of the jury selection process and the punishment imposed as the result of Mr. Coleman's conviction for the crime of aggravated kidnapping. The majority has also failed to address Mr. Coleman's remaining constitutional attacks on his *convictions* for aggravated kidnapping, deliberate homicide and forcible rape.

In refusing to consider the constitutional integrity of Mr. Coleman's convictions for deliberate homicide and forcible rape, the majority appears to have blinded itself to the fact that the prisoner was sentenced to serve 120 years for these offenses and that he seeks an evidentiary hearing in the district court so that he can demonstrate that the Montana court's judgment on the issue of guilt must be set aside.

III

Mr. Coleman attacks the validity of his *convictions* for deliberate homicide, aggravated homicide, and forcible rape on the following grounds:

One. The evidence produced at trial was insufficient to convince a rational jury of Mr. Coleman's connection to the rape and murder of Peggy Lee Harstad. "A black man who has consistently maintained his innocence has been condemned to death, time after time, solely on the uncorroborated and incredible testimony of a white alleged accomplice who purchased his own life with his testimony." Appellant's Opening Brief, page 48. In his amended petition for a writ of habeas corpus, Mr. Coleman also challenges the trial court's failure to rule on his objection to the accomplice's mental competency to testify at the *guilt* phase of the trial.

Two. He was denied the effective assistance of counsel. Mr. Coleman asserts that without his knowledge or consent, his first defense attorney told the trial judge that truth serum tests had revealed that his client was guilty. *"[T]his information must have colored not only the trial court's view of the nature and extent of Coleman's guilt,* but, when coupled with Coleman's extensive trial testimony protesting his innocence, must have led the trial court to conclude that Coleman was both a murderer and a perjurer." Appellant's Opening Brief, page 23. (emphasis added). See Appellant's Opening Brief, page 30 n.1.

Three. Mr. Coleman contends that he "was *tried, convicted,* and sentenced as a result of pervasive racial discrimination." Appellant's Opening Brief, page 47 (emphasis added). He argues that the trial judge's reference to Mr. Coleman as "this black boy" demonstrates racial discrimination compelling reversal of the judgment of conviction of each crime. Appellant's Opening Brief, page 47.

The majority's sole response to these constitutional challenges to the validity of the judgment of *conviction* for aggravated kidnapping, deliberate homicide, and forcible rape is contained in footnote 9 of its opinion. The majority offers the following explanation for its failure to

review these colorable constitutional claims concerning the validity of the *guilt* phase of his trial:

> Coleman's contention that he was prosecuted and sentenced to death, because of race discrimination when that state plea bargained with Nank, a white man, but refused to enter into a plea bargain with Coleman, who is black, does not impact his conviction of deliberate homicide. He would have been convicted upon his offer to plead guilty to this crime in any event.

Thus the majority has chosen to ignore Mr. Coleman's claim that, notwithstanding his innocence, he was selected for prosecution solely because he is black.

If Mr.Coleman was selected for prosecution as the result of invidious discrimination based on his race, a plea resulting from the state's violation of his constitutional rights would be tainted and invalid. Contrary to the majority's conclusion, proof that the prosecution of Mr. Coleman was animated by racial discrimination would clearly "impact his conviction."

The majority has not cited any authority for its extraordinary assumption that a state prisoner whose offer to plead guilty was rejected, may be denied his right to an evidentiary hearing in order to prove that he was selected for prosecution solely because of the immutable fact that he is black. The fact that a person once offered to plead guilty to avoid the death penalty should not bar him from proving that he was selected for prosecution because of his race, especially in a case where it is alleged that the *rejection of his offer* is at least prima facie proof of racial bias.

The majority speculates in footnote 9 that *if* Mr. Coleman had entered a plea of guilty under the circumstances reflected in the record, it would have passed careful constitutional scrutiny. Without exposing its rationale, the majority appears to assume that a plea of guilty, by a person who was the victim of selective prosecution *and* injected with sodium amytol [sic] while in custody, is valid. I cannot agree. To validate a plea under such circumstances would reward outrageous governmental conduct in clear violation of a state prisoner's rights to due process and equal protection.

I recognize that the Supreme Court has held that a trial judge may accept a guilty plea from a person who informs the court that he is innocent but wishes to avoid the extreme penalty. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). There was no claim in *Alford*, however, that the prisoner had been selected for prosecution because of his race and had received ineffective assistance of counsel. No showing was made in *Alford* that the plea of guilty was constitutionally invalid on any ground. It should also be noted that the Supreme Court cautioned in *Alford* that its holding "does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead." *Id.* at 38.

Assuming the truth of Mr. Coleman's allegations, as we must in this appeal, it would have been improper for the state of Montana to have accepted Mr. Coleman's plea of guilty if he was selected for prosecution in violation of his federal constitutional rights. Furthermore, the evidence is undisputed that Mr. Coleman's offer to plead guilty followed an alteration of his memory by the state concerning his participation in the crimes charged against

him as a result of an injection of sodium amytol [sic]. Long ago, in *Townsend v. Sain*, 372 U.S. 293 (1963), the Supreme Court observed that a confession of guilt that is drug induced would be involuntary. *Id.* at 307-309. I seriously doubt that any of my colleagues would uphold a guilty plea obtained under such circumstances.

In footnote 9, the majority also states: "Until Coleman is resentenced, we cannot evaluate the merits of his claim of race discrimination based upon the State's refusal to plea bargain with him as it did Nank." The majority does not inform us why it cannot "evaluate" the merits of the claim of racial discrimination prior to resentencing. We have jurisdiction over this matter under section 2254. The federal constitutional claims are ripe for review. If these claims are valid, the majority has a duty to "evaluate" and invalidate the conviction now. There can be no valid sentence for a conviction based on invidious discrimination.

In the passage quoted in the preceding paragraph, the majority appears to suggest, albeit with delicate subtlety, that Mr. Coleman's claims of invidious selective prosecution, may possibly survive this appeal if this court is dissatisfied for unexplained reasons with the sentence imposed by the trial court for aggravated kidnapping or the treatment Montana gives to the *conviction* for that crime[1]. Does the majority mean by this puzzling comment

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[1] The majority appears to have affirmed *sub silentio* the district court's dismissal of his claims that he was denied effective counsel and that he was convicted in clear violation of Montana law on the uncorroborated testimony of a mentally incompetent accomplice. The majority does not suggest that it will evaluate the merits of these claims after Mr. Coleman is resentenced.

that Mr. Coleman may return to the district court with a new petition for habeas corpus relief limited to the *sentence* "other than death" imposed by the Montana trial court upon remand for the crime of aggravated kidnapping? Or, instead, is the majority suggesting that Mr. Coleman may file an untimely petition for a rehearing in this court for a review of the judgment of *conviction* for aggravated kidnapping *limited to the claim of invidious discrimination*, if Montana's treatment of this conviction falls below the majority's undisclosed expectations? It should also be noted that because the remand is solely for resentencing for aggravated kidnapping, the State of Montana is under no duty, under the majority's mandate, to "treat" further the judgment of *conviction* for any of the crimes for which Mr. Coleman stands convicted.

I do not understand the majority's reluctance to face up to Mr. Coleman's constitutional attack on the judgment of *conviction* for aggravated kidnapping, deliberate homicide, and forcible rape in the appeal presently before this court. If Mr. Coleman has stated sufficient facts to show that these convictions were obtained in violation of his constitutional rights, he is entitled to an evidentiary hearing in the district court now. The treatment Montana may give the *sentence* for aggravated kidnapping upon remand has no bearing on the validity of Mr. Coleman's challenge to his *convictions* for aggravated kidnapping, deliberate homicide or forcible rape. Let us assume that upon remand Montana requests and is granted a dismissal of the aggravated kidnapping charge. In that event, has the majority concluded, by its concern over how Montana will "treat" the aggravated kidnapping charge, that Mr. Coleman should spend the rest of his life

in prison on the remaining charges, without further federal review, notwithstanding the fact that he has alleged that he is the victim of invidious selective prosecution because he is black, that he received ineffective assistance of counsel at the guilt phase of the trial, and that the evidence supporting his conviction is based on the testimony of an uncorroborated and mentally incompetent accomplice? Mr. Coleman has spent over thirteen years in custody. He is entitled to his freedom now if he can prove the truth of these allegations without regard to Montana's treatment of the aggravated kidnapping charge.

In footnote 9, the majority attempts to justify its failure to confront Mr. Coleman's serious constitutional challenges to his convictions with the curious comment that "there is a strong practical possibility that today's decision upholding one of Coleman's principal constitutional arguments will serve ultimately to make it unnecessary for us to consider Coleman's remaining claims." Majority Opinion, page 4702-03 n.9. Nothing in the record, the many briefs that have been filed in this matter, or the arguments of Mr. Coleman's counsel support the majority's speculation that he will abandon his claim that he is an innocent black man victimized by racial discrimination if the sentence imposed for aggravated kidnapping is reversed.[2]

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[2] If the majority's efforts at mind reading prove to be accurate, it may have discovered a calendar clearing procedure I will label "appellate sentence bargaining," in which a state prisoner is induced to abandon meritorious federal constitutional challenges to the guilt phase of the trial in exchange for a sentence "other than death."

The majority persists in ignoring the fact that if Mr. Coleman was the victim of invidious selective prosecution, his conviction for aggravated kidnapping is invalid. If so, any sentence, whether life or death, must also be set aside.

The majority has avoided deciding hard constitutional questions properly before it concerning the validity of the convictions and has purported to resolve a *sentencing* issue it has no jurisdiction to reach if selective *prosecution* on racial grounds has been demonstrated.

In 1981, Justice Morrison of the Montana Supreme Court made the following comment about this case:

> The majority has one salutary aspect. It has finally freed Coleman from the yoke of the state court system and permits him to pursue his claims in federal court. A federal court cannot help but be more receptive to the important questions that Coleman has raised but this court has turned down by wholesale and summary disposition. I cannot conceive that this case will leave a federal court with the abiding conviction that justice was done.

Coleman v. State, 633 P.2d 624, 666 (1981) (Morrision, J., dissenting).

Unfortunately, Justice Morrision was wrong. This case will be returned to Montana by the federal court system without discussing or resolving Mr. Coleman's claim that his convictions must be set aside because of selective prosecution, ineffectiveness of counsel, and legal insufficiency of the evidence to convince a rational trier of fact of his guilt beyond a reasonable doubt.

I would not want the task of explaining to Mr. Coleman that his federal constitutional challenges to his *convictions* for aggravated kidnapping, deliberate homicide, and forcible rape will not be reached by this court because "there is a strong practical possibility" that he will give up his claim that an innocent man was selected for prosecution because he is black in view of the fact that the majority reversed the *sentence* imposed for aggravated kidnapping. A prisoner who forcefully has proclaimed his innocence for over thirteen years, condemned to be imprisoned for the remainder of his life, might be forgiven if he suppresses his enthusiasm for the majority's imaginative interpretation of Mr. Coleman's undisclosed goals in this litigation.

IV

The court's disposition of this appeal is also unfair to the State of Montana. The majority has reversed the sentence of death for the crime of aggravated kidnapping because, at the trial on the issue of guilt, Mr. Coleman's defense counsel introduced evidence that his client participated in an uncharged burglary. Instead of ordering that a new trial be conducted so that Montana can attempt to prove, after an error-free trial, that the extreme penalty is warranted, the majority has reversed the sentence of death; ordered a punishment "other than death"; ruled against Mr. Coleman's challenge to the jury that *convicted* him; and implicitly affirmed the denial of an evidentiary hearing on his remaining constitutional claims that clearly "impact" on his *convictions* of each offense. Thus, with the same brushstroke, the majority has denied Mr. Coleman the opportunity to prove that he

is entitled to his freedom from the threat of any further incarceration on the aggravated kidnapping charge, not merely a punishment "other than death," and interfered with Montana's right under the police powers expressly reserved to the states by our federal constitution, to impose the death penalty for this offense.

The majority has not explained why it has denied to Montana the opportunity to seek the death penalty upon remand under circumstances free of constitutional error. In footnote 7, the majority expressly declines to reach the question whether a state prisoner who was sentenced under a constitutionally defective statute can receive a death sentence under a law enacted after his conviction. Nevertheless, without explanation or citation to the source of its authority, the majority has decreed that the State of Montana may not again impose the death penalty in this case.

If the majority has silently concluded that a state may not resentence a condemned person under a statute enacted after his or her conviction, I respectfully suggest that this important constitutional issue is deserving of thoughtful discussion and critical analysis. Instead, while the opinion carefully explains in footnote 7 that this issue will not be reached, the majority proceeds without explanation to enter an order that denies *ex post facto* effect to a death penalty statute. Proper respect for comity and "our federalism" demands that we act with appropriate restraint and sensitivity, and set forth a principled explanation, when we deny to a state the right to follow its own public policy in selecting the appropriate punishment that should be imposed for a violation of its criminal code. *See Rummel v. Estelle*, 445 U.S. 263, 274 (1980)

("one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.") I regret that the majority has declined to offer any justification for its casual treatment of this grave constitutional question.

CONCLUSION

Once again, Mr. Coleman has been denied a decision on the merits of his serious allegations of racial discrimination against the State of Montana in selecting him for prosecution of aggravated kidnapping, deliberate homicide, and forcible rape. After thirteen years in custody, Mr. Coleman has the right to be told *now* whether the majority believes that he is entitled to an evidentiary hearing to test the constitutional validity of the guilt phase of his trial.

The Supreme Court has instructed federal courts that colorable claims of constitutional error must be given careful scrutiny in a capital case. *Zant*, 462 U.S. at 885. Inexplicably, the majority has concluded that it has no duty whatsoever to scrutinize Mr. Coleman's claims of selective prosecution against an innocent black man, ineffectiveness of counsel at the guilt phase of the trial proceedings, and a denial of due process based on the legal insufficiency of the evidence to support his conviction.

The majority appears to have concluded that Mr. Coleman will be willing to abandon his claim that he was *convicted* of deliberate homicide and forcible rape in violation of several of his constitutional rights in view of its

determination that Montana cannot exact the death penalty in this case. I have read the briefs and heard the oral arguments in this matter. I can find no clue that Mr. Coleman's thirteen-year challenge to his *conviction* of each offense has been a clever tactical ploy and that his only goal has been to avoid the death penalty.

Because this is an en banc proceeding, further review of Mr. Coleman's claims before this court in this appeal is unlikely. If the majority has misjudged Mr. Coleman's intentions, he must now seek relief from the United States Supreme Court. If so, the Supreme Court undoubtedly will summarily remand this matter with directions that we exercise our appellate responsibility to decide whether Mr. Coleman has stated sufficient facts which, if true, require that the judgment of conviction be set aside because he is the victim of selective prosecution, he was ineffectively represented at the guilt phase of his trial and the evidence of his guilt is legally insufficient.

Montana may also elect to seek review of the majority's conclusion that it can vacate a sentence of death and bar its reimposition, without determining the constitutionality of Montana's capital punishment statute or offering an explanation of the source of its power to limit the state court's discretion.

The unprecedented procedure adopted by the majority for this appeal has denied Mr. Coleman his right under section 2254 to a review of his federal constitutional challenges to the guilt phase of his trial. The majority has also exceeded its limited jurisdiction by purporting to deny to Montana its right to select the appropriate punishment, consistent with the eighth

amendment, for violation of its laws. Because I am persuaded that we cannot ignore any of the colorable constitutional challenges to Mr. Coleman's convictions presented in this appeal in the manner suggested by my colleagues, I respectfully decline to join in their number.

I would first determine whether each of the convictions should stand before discussing the validity of sentences imposed by the court. If each of the convictions must be reversed because of invidious selective prosecution, ineffectiveness of counsel, or the legal insufficiency of the evidence, the issue of punishment for any offense becomes moot, and a discussion thereof becomes advisory and beyond our limited jurisdiction.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEWEY E. COLEMAN, *Petitioner-Appellant,*	)	No. 85-4242
v.	)	D.C. No. CV-81-272-BLG
HENRY RISLEY, Warden, Montana State Prison, and MICHAEL T. GREELEY, [sic] Attorney General for the State of Montana, *Respondent-Appellees.*	)	OPINION AND DISSENT*

Appeal from the United States District Court
for the District of Montana
James F. Battin, District Judge, Presiding

Argued and Submitted
May 7, 1986 – Portland, Oregon

Filed January 19, 1988

Before: Arthur L. Alarcon, Stephen Reinhardt and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson; Dissent by Judge Reinhardt

COUNSEL

Henry T. Greely, Stanford Law School, Stanford, California, for the petitioner-appellant.

James M. Scheier, Assistant Attorney General, State of Montana, Helena, Montana, for the respondents-appellees.

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*This is the first of two booklets; see page 613 for Judge Reinhardt's dissent.

OPINION

THOMPSON, Circuit Judge:

Dewey E. Coleman, a Montana state prisoner who has been sentenced to death, appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We affirm.

I

FACTS

On July 4, 1974, Peggy Lee Harstad, twenty-one years old, disappeared while driving alone from Harlowton to Rosebud, Montana. The next day her car was found within a few miles of her home, near Rosebud. Several days later, a ranch hand discovered her purse inside a culvert about ten miles from her abandoned car. In the investigation which followed, an elderly couple reported that on the evening Harstad disappeared they had seen a black man and a white man hitchhiking between Roundup and Forsyth, Montana at about the time Harstad had been driving between those towns. The two men were identified as Dewey Eugene Coleman, a black man, and Robert Dennis Nank, a white man.

On July 9, 1974, representatives of the Rosebud County sheriff's office questioned Nank. He admitted being in the area where Harstad had last been seen alive, and hitchhiking through Forsyth, Montana on the evening of July 4th. In an interview with FBI agents about one month later, Nank also admitted seeing the Harstad vehicle abandoned on the road and finding a purse along the road where he and Coleman had been hitchhiking. By

this time the FBI had reported a positive comparison between Coleman's fingerprint and a fingerprint which had been lifted from a paper found in Harstad's purse. Vacuumings taken from the Harstad vehicle revealed Negroid head hairs and two Negroid pubic hairs.

On August 29th, almost two months after her disappearance, Harstad's body was found on the north bank of the Yellowstone River, just west of Forsyth, Montana. Because of decomposition of her remains, a cause of death could not be determined.

Nank and Coleman were arrested in Boise, Idaho in October, 1974 and charged with deliberate homicide in the death of Peggy Lee Harstad. During questioning Nank gave a full confession implicating himself and Coleman in the kidnap, rape and murder of Harstad. Coleman denied any involvement in the crimes. The apartment where Nank and Coleman lived was searched, as was their car. Two motorcycle helmets and a rope Nank said had been used in the crimes were recovered. Coleman and Nank were charged with deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. A conviction of aggravated kidnapping carried with it a mandatory death sentence. Mont. Code Ann. § 94-5-304 (1947) (repealed 1977).

On May 7, 1975, Nank entered into a written plea agreement with the State. He agreed to plead guilty to deliberate homicide and solicitation to commit sexual intercourse and to testify against Coleman in return for dismissal of the aggravated kidnapping charge; the dismissal of the aggravated kidnapping charge was not to occur until after Nank had testified at Coleman's trial.

Coleman's counsel entered into plea bargaining discussions. Coleman insisted on maintaining his innocence, however, and was unable to make a plea agreement with the State.

On July 2, 1975, a pretrial hearing was held on a motion brought by Coleman's counsel seeking to obtain a court order authorizing the copying of Nank's medical records. Coleman was not present at the hearing. His counsel explained that Coleman had been taken to Billings, Montana for a sodium amytal examination to see if he could remember the events of July 4, 1974. During the course of the hearing, Coleman's counsel stated he wanted to enter into further plea negotiations with the State. The following colloquy occurred:

Defense Counsel: I want to enter into further plea bargaining with the State and with the Court. . . . Also what I have to say today, I have not confirmed with my client, but I believe because of the shortness of time between now and the time of trial, it should be raised. . . . My client – well, also I want to proceed on the basis that this is plea bargaining and things I should say should not be held against my client at some later time. Is that understood?

State's Attorney: I don't go for that at all. I think we're either presenting an argument here. If we're going to hold

a plea bargaining conference, let's do that later. . . .

The Court: I think that what he's doing is laying a foundation to bring something up. Now go ahead.

Defense Counsel: That's correct. I'll go forward. I don't believe that my statements can be used against my client in any event. The purpose of the psychiatric examination was to place my client under sodium amytal to see if his recollection and memory could be refreshed, because in all communications with me, he could not tell me what happened. He continually asserted his innocence and it presented quite a problem in trying to defend him. That was the purpose, to send him to Dr. Harr to have him placed under sodium amytal. That investigation has been conducted and I believe on the basis of that examination, that my client will want to enter a plea of guilty.

The Court: Without the condition of –

Defense Counsel: Without the assertion of innocence. Now these statements I make are based on conversations I had with my client prior to the

time he went up for the examination. That if the examination revealed certain things that refreshed his memory and indicated that the story that Nank was telling was in fact true, or substantially true, that then my position would be that we should go back to the Court and offer to enter a plea with the understanding that the death penalty not be imposed, and then if the memory is refreshed and his recollection of events is sustained after the sodium amytal has worn off, that then he would testify fully as to what his extent of participation was in the crime, and to avoid what I thought was the prosecution's most severe objection, and that is that he was entering a plea and saying he was innocent, and that this would allow him to get out. Now I know that the State indicated before that they thought he should be hung. I don't know what the State's position is. Now Mr. Coleman will be returning to Miles City, according to Dr. Harr, sometime around eleven o'clock. I intended to immediately confer with him.

Doctor Harr has called me already this morning and from the information I have received, it appears that my client's memory has been refreshed and there was participation on his part in the crime. Therefore, my function I believe, is to try to accomplish and make arrangements with the State and with the Court to save my man's life, and also it presents a personal problem and personal dilemma to me that would mean if we have to continue with the trial with my feelings of what Dr. Harr told me, and that if that's true, it will be very difficult to continue in the defense and to argue the case. Now that's a personal dilemma that I have.

The Court: That may be a personal dilemma, but it's an obligation that you'll have to go through with. So your client now makes the same proposition to the State as Nank has?

Defense Counsel: Yes, he would.

No agreement or understanding was reached at the July 2nd hearing. When court was convened the next day, Coleman was present. His counsel referred to the sodium amytal examination and stated that Coleman would plead guilty "under the same terms and conditions as has

been accepted by the State with regard to Mr. Nank." The State refused to accept from Coleman the same plea bargain which had been made with Nank. The prosecutor stated he was concerned about Coleman challenging the voluntariness of his plea at a later time. He stated there were circumstances in Coleman's case which made it significantly different from Nank's. He stated these included the fact that claims had been made in Coleman's case that his attorney was incompetent and that a change of venue to avoid prejudice had not been a sufficient change to avoid such prejudice. He also pointed to Coleman's previous assertion of an insanity defense (which Coleman had later waived), and to the possibly unreliable sodium amytal procedure which had prompted Coleman to offer a guilty plea.

When Coleman's proposed plea bargain was rejected by the state, his counsel requested to be relieved. He stated that although he could defend Coleman on the aggravated kidnapping charge, there was "no way in the world I can state to the jury that he is innocent of deliberate homicide and that he's innocent of sexual intercourse without consent." The trial court denied the motion, but the Montana supreme court subsequently relieved Coleman's counsel and appointed new counsel to represent him. Coleman's new counsel took over his representation unaware of the proceedings which had taken place on July 2 and 3.[1]

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[1] The new counsel did not obtain a transcript of the July 2 and July 3, 1975 hearings until February 1982. *See Coleman v. Risley*, 663 P.2d 1154, 1158 (Mont. 1983) (*Coleman IV*). Coleman's habeas corpus petition was filed in the United States district court in November 1981.

Trial began in October 1975. Coleman and Nank both testified. They had met one another at the Veterans Hospital in Sheridan, Wyoming. Coleman was being treated for depression. Nank had a history of mental illness. They were discharged from the Veterans Hospital and traveled to Montana on Nank's motorcycle. They ran out of gas between Roundup and Forsyth during the evening hours of July 4, 1974 and decided to hitchhike. From this point on their stories differed.

Coleman testified that he and Nank had been unsuccessful in their attempt to hitchhike, but that Nank was able to obtain a ride for himself and headed toward Forsyth. Nank returned several hours later driving a car subsequently identified as Harstad's. He told Coleman he had killed a woman, and asked Coleman to hide a woman's purse which he had brought back; Coleman complied. Coleman denied any involvement in the death and maintained he did not report Nank to the authorities because he ws afraid of retribution from Nank and was afraid he would be implicated in the crime.

Nank testified that when the Harstad vehicle stopped, both he and Coleman got into the car. As they proceeded toward Forsyth, Nank turned the ignition key off and maneuvered the vehicle to the side of the road. He tied Harstad's hands together with a yellow nylon rope, removed her clothing except for her blouse and attempted to have sexual intercourse with her but could not maintain an erection. Coleman then got in the back seat with Harstad and had sexual intercourse with her. Nank testified that thereafter he dressed the victim and they drove to the Yellowstone River. Nank carried Harstad over his shoulder to the side of the river. He put her

down, and as they were talking, Coleman came from behind and hit Harstad several times on the head with his motorcycle helmet.[2] Coleman then took the rope from Harstad's hands and attempted to strangle her. Nank said Coleman asked him to help, but he was unable to do so. Both men then carried Harstad, who was unconscious, to a drainage area near the river where they dumped her body. When Harstad attempted to get up, Coleman held her feet and Nank held her head under the water until she was drowned.

II

PRIOR COURT PROCEEDINGS

A jury convicted Coleman of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, inflicting bodily injury. He was sentenced to one hundred years for deliberate homicide and forty years on the rape charge. He was sentenced to death for aggravated kidnapping under Montana's mandatory death penalty statute.[3] On appeal, the Montana supreme court held that the mandatory death penalty statute was unconstitutional. *State v. Coleman*, 177 Mont. 1, 579 P.2d 732,

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[2] The State contended the crack in Coleman's motorcycle helmet was caused by striking Harstad on the head, and that the crack in the helmet was part of the evidence corroborating Nank's testimony. At Coleman's trial, a pathologist testified Harstad's skull had not been fractured.

[3] The statute provided that "[a] court shall impose sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as a result of the criminal conduct." Rev. Code Mont. § 94-5-304 (1947) (repealed 1977).

741-42 (1978) (*Coleman I*). Coleman's death sentence was vacated and his case was remanded to the trial court for resentencing.[4] Coleman was then resentenced to death in 1978 under a new Montana death penalty statute which had been enacted in 1977. Mont. Code Ann. §§ 95-2206.6 through 95-2206.15 (now codified at Mont. Code Ann. §§ 46-18-301 through 46-18-310; hereinafter cited in pre-codification version, and reproduced at Appendix). Coleman's sentence was automatically reviewed by the Montana supreme court. Mont. Code Ann. §§ 95-2206.12 through 95-2206.15. The court upheld his convictions and sentences. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979) (*Coleman II*), *cert. denied*, 446 U.S. 970 (1980); *Coleman v. Sentencing Review Division of Supreme Court of Montana*, 449 U.S. 893 (1980) (vacating stay of execution of death sentence and denying certiorari).

Thereafter, Coleman filed a petition with the State court for post-conviction relief. His judgment and sentence were once again reviewed and affirmed by the Montana supreme court. *Coleman v. State*, 633 P.2d 624 (Mont. 1981), *cert. denied*, 455 U.S. 983 (1982) (*Coleman III*).

A petition for writ of habeas corpus under 28 U.S.C. § 2254 was filed in the United States district court for the

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[4] Coleman's sentence for sexual intercourse without consent, inflicting bodily injury was also vacated. The Montana supreme court concluded there was insufficient evidence to show Coleman had inflicted bodily injury upon Harstad in the course of committing sexual intercourse because she was murdered sometime after the rape incident. *Coleman I*, 177 Mont. 1, 579 P.2d at 742-43.

district of Montana in November 1981. The State provided Coleman with a list of all transcripts and proceedings that were recorded but not transcribed in the State court. It was at this time that Coleman's new counsel first learned of the July 2 and July 3, 1975 hearings during which the result of Coleman's sodium amytal test and plea proposals had been disclosed and his then counsel had requested to be relieved as his attorney. The federal habeas corpus proceeding was stayed to provide Coleman the opportunity to exhaust his State remedies for review of his convictions and death sentence in view of these hearings. The Montana supreme court denied Coleman's petition for post-conviction relief. *Coleman v. Risley*, 663 P.2d 1154 (Mont. 1983) (*Coleman IV*).

Coleman then filed a motion for an evidentiary hearing on his habeas corpus petition in the district court. He sought a hearing on twelve of the thirty-seven issues raised in his petition, and filed a motion for summary judgment on the remaining issues. The State also filed a motion for summary judgment. On August 9, 1985, the district court granted the State's motion and entered judgment against Coleman. He appeals.

Coleman contends: (a) his resentencing under the 1977 death penalty statute violated the *ex post facto* clause of the Constitution; (b) Montana's death penalty statute unconstitutionally required him to bear the burden of proof of mitigating factors; (c) his jury panel was selected in an impermissibly discretionary manner; (d) his trial, conviction, and death sentence were the result of racial discrimination; and (e) his sentence was imposed in violation of due process of law.

III

EX POST FACTO LAW

Coleman was convicted and first sentenced to death in 1975 under a mandatory death penalty statute subsequently held to be unconstitutional in 1978 by the Montana supreme court in *Coleman I*, 177 Mont. 1, 579 P.2d at 741-42. In 1977, the Montana legislature passed a new death penalty statute, the constitutionality of which was upheld in *State v. McKenzie*, 177 Mont. 280, 581 P.2d 1205, 1228-29 (Mont. 1978), *vacated on other grounds*, 443 U.S. 903 (1979). Coleman was resentenced in 1978 under this new statute. He contends the *ex post facto* clause of the Constitution was violated when he was resentenced to death under the 1977 statute.

To violate the *ex post facto* clause of the Constitution, a law must be retrospective and it must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985). Furthermore, "[e]ven if a retroactive change in the law is a disadvantage to the criminal defendant, it does not violate the [*ex post facto*] clause if the change is procedural rather than substantive." *United States v. McCahill*, 765 F.2d 849, 850 (citing *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)).

During Coleman's trial, Nank testified on cross-examination that on the day Peggy Lee Harstad was murdered, he and Coleman burglarized a home in Roundup, Montana and stole some guns. The sentencing judge considered this circumstance at the time Coleman was resentenced to death under Montana's amended 1977 death penalty statute. Coleman claims he would not have

cross-examined Nank concerning the Roundup burglary had he known this testimony would eventually be used against him at a sentencing hearing. Under the old death penalty statute Nank's testimony concerning the Roundup burglary would not have had any effect on whether Coleman was sentenced to death. His conviction of aggravated kidnapping mandated a death sentence. He argues that the new sentencing law changed the "rules of the game" to his detriment after his trial and before sentencing.

Coleman is correct that Montana's new sentencing law was enacted after his trial. But the new law did not change the "rules of the game." Nank's testimony regarding the Roundup burglary was admitted at Coleman's trial and was fully admissible at the sentencing hearing under Montana's new sentencing regime. Section 95-2206.7 of the Montana Code authorizes the sentencing judge to receive "evidence . . . as to any matter the court considers relevant to the sentence, . . . and any other facts in aggravation or mitigation of the penalty." Mont. Code Ann. § 95-2206.7. In evaluating mitigating circumstances, the judge considers, among other things, the defendant's "prior criminal activity." *Id.* § 95-2206.9(1). Coleman's argument that the new law disadvantaged him rests upon the unsubstantiated assumption that the circumstance of the Roundup burglary would not have been brought to the attention of the court at the sentencing hearing, *but for* Coleman's cross-examination of Nank at trial. Coleman has provided nothing to support this assumption. *See Dobbert*, 432 U.S. at 294 (discussed *infra;* rejecting petitioner's "speculation" that jury would have

recommended life imprisonment had prior law still been in effect).

Coleman's counsel suggested at oral argument that Coleman's trial counsel would have cross-examined Nank differently and scrutinized his testimony about the Roundup burglary more effectively had the new sentencing law been in effect. Given that Nank and Coleman testified as to conflicting accounts of the events the day the murder occurred, the suggestion that Coleman's attorney had no motive to scrutinize Nank's recollection of the burglary which Nank said occurred on the day of the murder is unconvincing. Further, Coleman has not shown he was denied the opportunity to reexamine Nank at the sentencing hearing. *See* our discussion *infra* section VII, 3b. However, even if we were to accept Coleman's assumption, the Supreme Court's holding in *Dobbert* dictates rejection of his *ex post facto* claim.

In *Dobbert*, Dobbert committed crimes when Florida had an unconstitutional death penalty statute which punished a defendant with death unless the jury recommended mercy. 432 U.S. at 288. By the time Dobbert was brought to trial, Florida had enacted a constitutional statute; the new law removed the presumptive death sentence, but permitted the judge to override the jury's recommendation of lenience. *Id.* at 290-91. At Dobbert's trial, the jury by a ten-to-two majority found sufficient mitigating circumstances to outweigh any aggravating circumstances and returned an advisory verdict recommending life imprisonment. *Id.* at 287. The trial judge, however, overturned this recommendation and sentenced Dobbert to death. Dobbert argued that the new law violated the *ex post facto* clause because (among other things)

under the former death statute the jury's recommendation of life would not have been subject to the trial judge's nullification. The Court rejected this argument on two independent grounds, both present here: the new Florida law was procedural, and it was ameliorative. *Id.* at 292 & n.6.

A. *Procedural Change*

The Court in *Dobbert* began its analysis by reiterating the "well settled" principle that the *ex post facto* clause does not " 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.' " *Id.* at 293 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). As a corollary to this principle, the Court noted "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Id.* The Court discussed two cases to support this proposition. *Thompson v. Missouri*, 171 U.S. 380 (1898); *Hopt v. Utah*, 110 U.S. 574 (1884). In *Thompson*, the Missouri supreme court reversed the defendant's conviction because of the inadmissibility of certain evidence in a case tried on circumstantial evidence. Prior to his retrial, the law was changed to make the evidence admissible and the defendant was again convicted. The *Thompson* Court held that the change which rendered the incriminating evidence admissible was procedural and did not violate the *ex post facto* clause because it "did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty." 171 U.S. at 387. Similarly in *Hopt*, the Court held that a statute

removing disqualification of certain classes of people who could be witnesses was procedural and hence did not violate the *ex post facto* clause. 110 U.S. 574. *See also Beazell*, 269 U.S. 167 (*passim;* new law on joint trial procedural). The Court in *Dobbert* concluded on the basis of the foregoing authorities that the change in Florida's sentencing law was procedural and therefore was not *ex post facto*. 432 U.S. at 293-94.

In the present case, as in *Dobbert*, *Thompson* and *Hopt*, Montana's new sentencing statute is procedural. The statute "simply altered the methods employed in determining whether the death penalty was to be imposed. . . .", *Dobbert*, 432 U.S. at 293-94, and did not change the punishment prescribed, or the quantity or degree of proof necessary to establish guilt. *Id.* (citing *Hopt*, 110 U.S. at 589-90). *See also McCahill*, 765 F.2d at 850-51 (law affecting bail pending appeal procedural); *Knapp v. Cardwell*, 667 F.2d 1253, 1262-63 (9th Cir.) (Arizona death penalty law enlarging ability to introduce mitigating factors held procedural), *cert. denied*, 459 U.S. 1055 (1982); *Ward v. California*, 269 F.2d 906 (9th Cir. 1959) (*passim*) (state law allowing introduction of evidence of defendant's background and history and of any facts in aggravation or mitigation of death penalty was procedural; one judge denial of certificate of probable cause, per Pope, J.). Even if Montana's new statute disadvantaged Coleman, therefore, it is procedural and not *ex post facto*.

B. Ameliorative Change

The Court in *Dobbert* further held that Florida's new death penalty statute, viewed *in toto*, was ameliorative.

The former statute established a presumption in favor of the death penalty and was unconstitutional. 432 U.S. at 294-97. The new Florida law, in contrast, established extensive procedural protections and had been upheld in *Proffitt v. Florida*, 428 U.S. 242 (1976). Here, Coleman was first sentenced under a mandatory death penalty statute which was unconstitutional. Thereafter, he was sentenced under a new statute which established extensive procedural safeguards (Mont. Code Ann. §§ 95-2206.6 through 95-2206.15) and is constitutional. *Coleman II*, 185 Mont. 299, 605 P.2d 1016-17 (and discussion *infra* section IV).

Coleman attempts to distinguish *Dobbert* by arguing that whereas Dobbert was tried, convicted and sentenced under a constitutional statute, he was tried and convicted under an unconstitutional mandatory death penalty statute, but sentenced under a constitutional statute. Relying on *Dobbert*, we rejected an identical *ex post facto* challenge to the Arizona death penalty statute in *Knapp*, 667 F.2d at 1262-63. In *Knapp*, several of the appellants were tried, convicted and sentenced under an Arizona death penalty statute later declared unconstitutional. Thereafter, their sentences were vacated and they were resentenced to death under a constitutional statute. *Id.* at 1257-58. We rejected appellants' attempt to distinguish *Dobbert* as a "distinction without *ex post facto* implications," *id.* at 1262, because the new statute was "both procedural and ameliorative." *Id.* at 1263. The effect of the new Arizona statute, like the new Montana statute, was to "enlarge the ability of defendants to introduce mitigating circumstances at sentencing." *Id.* Thus, "it 'neither made criminal a theretofore innocent act, nor aggravated a crime

previously committed, nor provided greater punishment, nor changed the proof necessary to convict.' " *Id.* (citation omitted).

C. *The Review Process*

Coleman also argues that the new statute violated the *ex post facto* clause because it changed the process by which a sentence of death was reviewed in Montana. Under Montana's death penalty statute in force at the time Coleman committed the acts of which he was convicted, and at the time he was tried and first sentenced to death, he had a statutory right to have his sentence reviewed by a Sentence Review Division. Mont. Code Ann. §§ 95-2502, 2211 (amended 1977). This review was designed to determine the appropriateness of the sentence with respect to the individual offender and particular offense, *McKenzie, 171 Mont. 278, 557 P.2d at 1029, and gave a convicted person the "right to have his sentence reviewed for equity, disparity, or consideration of justice." State ex rel. Greely v. District Court,* 180 Mont. 317, 590 P.2d 1104, 1110 (1979).

The new statute abolished review of death sentences by the Sentence Review Division and replaced it with automatic review by the Montana supreme court. *Coleman II,* 299, 605 P.2d at 1006; Mont. Code Ann. §§ 95-2206.12 through 95-2206.15. Under the new law, the State supreme court reviews a death sentence to determine (1) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the sentencing judge's findings of the existence or nonexistence of aggravating

and mitigating circumstances listed in the new statute; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.* § 95-2206.15. Coleman contends this is a substantive change because the Montana supreme court's review is limited, whereas the review commission had wide discretion to reverse a death sentence "for equity, disparity, or consideration of justice." This argument proceeds on the false premise that the Montana supreme court's review is "limited." It also overlooks the fact that while nebulous considerations of "equity" and "justice" could have operated to a defendant's advantage in reversing a death sentence under the old law, those vague terms could just as easily have worked to his disadvantage in upholding a death sentence arbitrarily imposed. *See Dobbert*, 432 U.S. at 294 (finality of jury determination of life or death under old law could operate equally to defendant's advantage or disadvantage; change in law to permit review by court not *ex post facto*).

Moreover, the Montana supreme court's review is not "limited" to a restricted list of mitigating circumstances. The court reviews a death sentence to determine whether the evidence supports the sentencing judge's findings of the existence or nonexistence of aggravating and mitigating circumstances specified in Mont. Code Ann. §§ 95-2206.8 and 92-2206.9. There is, in addition, a final all-encompassing subsection (8) that requires consideration of "[a]ny other fact . . . in mitigation of the penalty." *Id.* § 95-2206.9(8). While this final aspect of the court's review is focused on facts which were presented to the sentencing judge, the Montana supreme court

makes an additional independent review of the case to determine whether the sentence was imposed under influence of passion, prejudice, or other arbitrary factors, *id.* § 95-2206.15(1), and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.* § 95-2206.15(3). These review procedures, coupled with the review of mitigating factors, provide at least the same, if not greater, breadth of review as existed under the former statute, and provide a defendant with the added protection that his sentence review will not be limited to the potentially arbitrary application of a reviewing court's notions of "equity" and "justice."

We conclude, as did the district court and the Montana courts, that no *ex post facto* violation occurred by the application of Montana's 1977 death penalty statutes to Coleman in imposing the death sentence upon him.

IV

BURDEN OF BRINGING FORTH EVIDENCE IN MITIGATION

In *Fitzpatrick v. State*, 638 P.2d 1002 (Mont. 1981), the Montana supreme court held that Montana's death penalty statute did not impose upon the State the burden of proving the nonexistence of mitigating circumstances, but rather, placed the burden on the defendant "to bring forth the evidence pertinent to the question of mitigation." *Id.* at 1013. The court stated that "[t]his statute undoubtedly places the burden on the defendant to show that his life should be spared, but we find this to be constitutionally permissible." *Id.* (discussing *Coleman II*,

185 Mont. 299, 605 P.2d 1000 (1979), and *State v. Stewart*, 175 Mont. 286, 573 P.2d 1138, 1146 (1977).[5] Coleman argues that "[b]y requiring the defendant to bear the burden of establishing the presence of mitigating circumstances, and by requiring the sentencing authority to weigh the 'substantiality' of the mitigating circumstances, the Montana statute prevents the kind of individualized attention to the appropriateness of the death sentence that the Constitution demands."

To resolve Coleman's contention, we must examine two lines of Supreme Court authority which have intersected only once before in this court. *See Harris v. Pulley*, 692 F.2d 1189, 1194-95 (9th Cir. 1982) (involving state

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[5] We do not read *Fitzpatrick* as stating that a defendant must prove mitigating circumstances beyond a reasonable doubt. *Fitzpatrick* does not impose such a standard, nor does it require the defendant to prove mitigating factors by clear and convincing evidence or by a preponderance of evidence. 638 P.2d at 1013. Rather, *Fitzpatrick* holds that the State does not bear the burden of proof and that the defendant bears the burden of "bringing forth the evidence pertinent to the question of mitigation." *Id. See McMillan v. Pennsylvania*, 106 S. Ct. 2411, 2420 (1986) (sentencing courts often hear evidence presented without "clear and convincing" burden requirement or other such burden). The transcript of the sentencing hearing (see *infra* section VII) does not indicate that the court required Coleman to prove mitigation beyond a reasonable doubt; the record in fact reveals no burden allocation. Coleman raised the issue of burden allocation both in the State courts and district court.

On burden of production generally, *see Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986).

death penalty statute relieving state from burden of proving non-existence of mitigating factors beyond a reasonable doubt), *reversed on other grounds*, 465 U.S. 37 (1984). These are cases involving the facial adequacy of a state's death penalty statute as measured by the eighth and fourteenth amendments, *see, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976), and cases involving the allocation of the burden of proof in establishing guilt, *see, e.g., In re Winship*, 397 U.S. 358 (1970).

A. *Facial Adequacy of Statute*

In *Gregg*, a plurality of the Court stated that the constitutional concerns expressed in *Furman v. Georgia*, 408 U.S. 238 (1972) – that a court not act in an arbitrary or capricious manner – are best satisfied "by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." 428 U.S. at 195. The Montana death penalty statute provides for a bifurcated sentencing procedure conducted by the judge who presided at the trial or before whom the guilty plea was entered. Mont. Code Ann. § 95-2206.6. The defendant may present any probative evidence regarding aggravating or mitigating circumstances. *Id.* § 95-2206.7. The Montana statute also satisfies the general criteria established in *Gregg*, *Proffitt*, 428 U.S. 242, *Jurek v. Texas*, 428 U.S. 262 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978), for constitutional state death penalty statutes: the statute requires the sentencing judge to find at least one aggravating circumstance, Mont. Code Ann. § 95-2206.10; the judge must consider mitigating circumstances and must

find that no mitigating circumstance is sufficiently substantial to call for leniency, *id.* §§ 95-2206.7, 95-2206.9 and 95-2206.10; and the defendant receives prompt and extensive judicial review, *id.* § 95-2206.10 (and discussion *supra*). *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 466 (1984) (upholding similar statute). That the Montana statute does not require the State to prove the absence of mitigating circumstances, and permits the trial judge to weigh and balance mitigating and aggravating circumstances, does not violate the guidelines established in these cases. *See Proffitt*, 428 U.S. at 257-58 (upholding statute that did not impose a burden on state and permitted sentencing authority to balance factors in mitigation and aggravation); *Jurek*, 428 U.S. at 276 (allowing defendant to bring forth evidence on mitigation, but imposing no such burden on state); *Harris*, 692 F.2d at 1195 (interpreting *Proffitt* in similar fashion); *accord McMillan v. Pennsylvania*, 106 S. Ct. 2411, 2420 (1986) (same).

B. *Allocation of Burden of Proof*

The Supreme Court's pronouncements on the proper allocation of the burden of proof in criminal cases do not alter this conclusion. In *Winship*, 397 U.S. 358, the Court held that due process prevents conviction except upon proof beyond a reasonable doubt of every fact or element of the crime charged. *Id.* at 364. *See also Mullaney v. Wilbur*, 421 U.S. 684 (1975). *Winship* and *Mullaney* emphasized society's interest in the reliability of jury verdicts:

> The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance,

> both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .

421 U.S. at 699-700 (quoting *Winship*, 397 U.S. at 363); *see also Winship*, 397 U.S. at 372 (Harlin, J. concurring).

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court refined the principles established in *Winship* and *Mullaney*. There appellant was charged with second-degree murder which, under New York law, contained only two elements: intent to cause death; and causing death. *Id.* at 198. New York permitted the defendant to raise as an affirmative defense the mitigating circumstance of acting under extreme emotional disturbance, but the jury was instructed that the defendant bore the burden of proving the defense by a preponderance of evidence. *Id.* at 200. Appellant argued that placing the burden on a defendant to prove "mitigating factors" violated *Winship* and *Mullaney*. Specifically, he argued that *Mullaney's* "holding . . . is that the State may not permit the blameworthiness of an act or the severity of the punishment authorized . . . to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact . . . beyond a reasonable doubt." *Id.* at 214. The Court held, however, that *Mullaney* and *Winship* only required the State to prove each element of the crime for which the defendant is charged:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is true even though the State's practice, as in Maine, had

> been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the state deems so important that it must be either *proved* or *presumed* is impermissible under the Due Process Clause.

Id. at 215 (emphasis added).

Winship, Mullaney and *Patterson* teach that due process "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson*, 432 U.S. at 210. *See also McMillan*, 106 S. Ct. at 2416. Under Montana law, circumstances affecting mitigation are not facts or elements of the crime for which a defendant is charged; rather, they are facts weighed by the sentencing judge after the defendant has been convicted. Mont. Code Ann. § 95-2206.6. *See, e.g., McMillan*, 106 S. Ct. at 2417 (noting this fundamental distinction); *id.* at 2420 & n.8 (discussing *Proffitt); Patterson*, 432 U.S. at 226-27 (Powell, J., dissenting); *Foster v. Strickland*, 707 F.2d 1339, 1345 (11th Cir. 1983), *cert. denied*, 466 U.S. 983 (1984); *Ford v. Strickland*, 696 F.2d 804, 817-18 (11th Cir.) (en banc) (per curiam) (due process not violated when sentencing authority is permitted to weigh aggravating and mitigating circumstances after state has proven aggravating circumstances), *cert. denied*, 464 U.S. 865 (1983); *Andrews v. Shulsen*, 600 F. Supp. 408, 423 (D. Utah 1984); *Richmond v. Cardwell*, 450 F. Supp. 519, 524-25 (D. Ariz. 1978), *later proceeding, Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). *Accord Harris*, 692 F.2d at 1195. Nor under Montana law is the existence of mitigating circumstances a fact which must be "proved or presumed" in obtaining a conviction or even in imposing sentencing. *Patterson*, 432 U.S. at 215. Montana only requires the

sentencing judge to find one aggravating circumstance, Mont. Code Ann. § 95-2206.10, and then to consider mitigating circumstances. The statute comports with the general standards enunciated in *Gregg*, *Proffitt*, *Jurek*, and *Lockett* and does not transgress the specific limitations established in *Winship*, *Mullaney*, and *Patterson*.

Finally, in *Patterson* and recently in *McMillan*, 106 S. Ct. 2411, the Court has recognized that due process may limit a state's authority to define elements or facts necessary for a crime. *Id.* at 2416 (citing *Patterson*, 432 U.S. at 211 n.12). *See generally McGautha v. California*, 402 U.S. 183, 206 n.16 (1971) (noting that aggravating circumstances could have been part of offense but instead were used as post-conviction enhancement). Several factors convince us that due process does not require Montana to disprove the existence of mitigating circumstances in order to impose a death sentence. *First*, as noted, the Court has approved of several death penalty statutes imposing no such burden on the state. *See, e.g., Jurek*, 428 U.S. at 276. *Second*, the Montana death penalty statute establishes no presumptions and does not relieve the State of its burden of proving the defendant's underlying guilt. *See McMillan*, 106 S. Ct. at 2417, *Third*, mitigating circumstances as defined under Montana's death penalty statute permit the sentencing authority to exercise leniency. *See Patterson*, 432 U.S. at 203 n.9 ("the Due Process Clause did not invalidate every instance of burdening the defendant with proving an exculpatory fact"). They do not increase the punishment. *Id. Compare McMillan*, 106 S. Ct. 2411 (rejecting due process argument

that state definition of element in *aggravation* in sentencing defendant must be proven beyond a reasonable doubt); *id.* at 2421-26 (Stevens, J., dissenting).

We therefore reject Coleman's argument regarding the allocation of the burden under Montana's death penalty statute and the trial court's weighing and balancing of mitigating and aggravating circumstances.

V

JURY SELECTION

Following a challenge by the defendant three days before trial, the trial court dismissed the first jury panel and ordered a second panel drawn. Each name on the jury list was assigned a number, the numbers were placed in a box, and 200 were drawn. The court then directed the court clerk to obtain a panel of sixty jurors by telephoning persons drawn from the box to see if they would be available to serve on a jury within the next three days. Sixty-one of the prospective jurors indicated they would be available and sixty appeared for Coleman's trial. *Coleman I*, 177 Mont. 1, 579 P.2d at 746-47. It was from this panel that Coleman's trial jury was chosen.

Coleman contends that the sixty persons making up his jury panel were selected in an impermissibly discretionary manner. He alleges that potential jurors were asked whether they could appear for his trial and were allowed to excuse themselves on grounds not revealed to him. He further alleges that the system by which his

panel of sixty potential jurors was selected had the disproportionate effect of placing mainly white, affluent residents from the west side of Billings on the panel. He argues that this system was controlled, not random, and resembled the so-called "key man" system of jury selection.[6]

Coleman contends that he is entitled to an evidentiary hearing on this issue. To obtain an evidentiary hearing, Coleman "must show that (1) he has alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the truth of his allegations." *Harris*, 692 F.2d at 1197; *see also Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir.), *cert. denied*, 105 S. Ct. 137 (1984).

A. *Lack of Showing of Distinctive Group*

Trial by a jury of one's peers contemplates that an impartial jury will be drawn from a fair cross-section of the community. *Thiel v. Southern Pacific Co.*, 328 U.S. 217,

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[6] Coleman's argument that his jury panel was selected using the key man system is without merit. The key man system of jury selection involves the selection of particular persons to make up a pool from which a jury is then chosen at random. It is not unconstitutional on its face. *Castaneda v. Partida*, 430 U.S. 482, 497 (1977); *United States v. Nelson*, 718 F.2d 315, 319 (9th Cir. 1983). Here there is nothing to suggest the jury panel was chosen using the key man system. The initial 200 jurors were selected at random. *Cf. Castaneda*, 430 U.S. at 497. The panel of sixty potential jurors were in essence volunteers, a fact which standing alone does not render the composition of a panel unconstitutional. *Nelson*, 718 F.2d at 319.

220 (1946). The sixth amendment does not guarantee a randomly selected jury, *United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir.), *cert. denied sub nom., Utz v. United States*, 106 S. Ct. 592, 593 (1985), nor does it require that the jury contain representatives from every group in the community. *Lockhart v. McCree*, 106 S. Ct. 1758, 1764-65 (1986); *Thiel*, 328 U.S. at 220. A fair cross-section challenge to the constitutionality of the jury venire requires a showing:

(1) That the group alleged to be excluded is a 'distinctive' group in the community;

(2) That the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) That this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

United States v. Miller, 771 F.2d 1219, 1228 (9th Cir. 1985) (quoting *Duren*, 439 U.S. at 364).

Coleman contends that as a result of the jury selection process, persons from the lower socioeconomic areas of Billings were excluded from his panel of prospective jurors. He has not alleged any facts, however, from which it could be concluded that persons from the lower socioeconomic areas of Billings, Montana formed a distinctive group in the community, or that if such a group existed it consisted of a sufficient number of persons so that its systematic exclusion from jury panels would support a fair cross-section challenge under the sixth amendment.

Duren, 439 U.S. at 364; *see also Taylor v. Louisiana*, 419 U.S. 522, 531 (1975). *See United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977) (*passim*); *United States v. Potter*, 552 F.2d 901, 904-05 (9th Cir. 1977). Having failed to demonstrate the existence of a "distinctive" group, Coleman's claims that such a group was underrepresented in jury venires or was systematically excluded in the jury selection process also fail.

B. *Method of Selection of Available Jurors*

Coleman challenges the clerk's dismissal of 139 of the 200 potential jurors drawn from the box. There is nothing in the record, however, to suggest that the jurors who were excused by the clerk were excused for any reason other than their inability to serve in a jury trial which was to commence in three days. *Coleman I*, 177 Mont. 1, 579 P.2d at 746. Coleman does not contend, nor does the record reveal, that the 200 names from which the 60 members of his panel were chosen do not represent a fair cross-section of the community.

The method of jury selection in Coleman's case was similar to that which occurred in *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). There, 200 to 300 jurors were selected for jury service. The defendant did not contend that these jurors were not representative of a fair cross-section of the community. The jurors were told that the trial would be lengthy and the court asked how many jurors would be able to serve. Sixty-eight jurors indicated they would be available, and sixty of these were selected for the panel. *Id.* at 321. On appeal the defendant contended the jurors

were composed of volunteers and thus did not represent a cross-section of the community. *Id.* In rejecting this contention, the court concluded that the underlying complement of jurors represented a fair cross-section of the community and "[n]either the panel nor the trial jury became any less so by reason of the technique the judge employed." *Id.* at 322. The court went on to state, "the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality." *Id.; see also United States v. Branscome,* 682 F.2d 484, 485 (4th Cir. 1982); *United States v. Kennedy,* 548 F.2d 608, 611 (5th Cir.), *reh'g denied,* 554 F.2d 476 (5th Cir.), *cert. denied,* 434 U.S. 865 (1977).

Coleman did not present any affidavit or other evidence to suggest jurors were dismissed for any reason other than unavailability. His challenge to the sixty-person jury panel "consists exclusively of counsel's statements, unsworm and unsupported by any proof or offer of proof." *Frazier v. United States,* 335 U.S. 497, 503 (1948). These "conclusory allegations do not provide a sufficient basis to obtain a hearing in federal court." *Harris,* 692 F.2d at 1199.

Finally, Coleman argues in his reply brief that the trial judge improperly disqualified two jurors because of their opposition to the death penalty. He has failed to present any showing that would justify an evidentiary hearing on this issue. *Maggio v. Williams,* 464 U.S. 46, 50 (1983) (per curiam).

VI

RACIAL DISCRIMINATION

Coleman contends he was tried, convicted, and sentenced to death as a result of pervasive racial discrimination. He points to the fact that Nank, a white man, was permitted to plead guilty to crimes which did not carry the death penalty, whereas Coleman, a black, was denied the same bargain. He also points to the trial judge's reference to him as a "black boy." He contends he was entitled to a hearing on these contentions.

A. *The Plea Bargain*

The State permitted Nank to plead guilty to charges which did not carry the death penalty because he admitted his involvement in Harstad's murder and assisted the State in its investigation and prosecution of Coleman. On the other hand, Coleman maintained his innocence. When he first offered to plead guilty to non-capital charges, he insisted on maintaining his innocence as a condition of such a plea. The State was under no duty to accept Coleman's offer. The prosecution may refuse to bargain altogether, or cut off negotiations at any time. *United States v. Herrera*, 640 F.2d 958, 962 (9th Cir. 1981) (prosecution of defendant on original indictment upheld notwithstanding prosecution's acceptance of co-defendant's plea bargain).

When Coleman finally offered to accept the same deal accepted by Nank, he did so only after he had undergone a sodium amytal procedure which the State regarded as questionable. Before then, Coleman's former

counsel had claimed he was ineffective due to his lack of experience. Coleman had also contended that a change of venue had not been sufficient to eliminate prejudice against him. The State was concerned about the voluntariness of the plea. Moreover, the State already had Nank's agreement to testify against Coleman. Nank had pursued precisely the course which Justice Blackman suggested should have been pursued by one the defendants in *Burger v. Kemp*, 107 S. Ct. 3114, 3126 (1987) (Blackmun, J., dissenting). There, in commenting that the defendant's lawyer had been remiss in not offering the defendant's testimony against his co-defendant in exchange for a life sentence, Justice Blackmun stated: "[T]he prosecutor might have decided that . . . he would permit [the defendant] to plead to a life sentence in exchange for his testimony against [his co-defendant] and pursue the death sentence against [the co-defendant]." *Id.* at 3133 n.12. Here, this is what the prosecutor did. He allowed Nank to plead to a life sentence in exchange for his testimony against Coleman, and pursued the death sentence against Coleman.

The record reveals no evidence of racial prejudice. Despite the absence of this evidence, the dissent insists "[t]he key inquiry here must be as to the prosecutor's motives in repeatedly and vigorously refusing to accept, or even consider accepting, Coleman's guilty plea. . . ." (Reinhardt, J. dissent at page 13). However, as the Supreme Court stated in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987), "[T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, often years after they

were made." *Id.* at 1768 (footnotes and citations omitted). The Court further stated, "Our refusal to require that the prosecutor provide an explanation for his decisions . . . is completely consistent with this Court's longstanding precedents that hold that a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case." *Id.* at 1769 n. 18 (citations omitted). Coleman has not set forth any facts which would support a prima facie case of unconstitutional conduct. As the dissent notes, Coleman makes "a concrete claim of unequal treatment on the basis of race." (Reinhardt, J. dissent at page 7). This may be so, but he presents no facts to support the claim.

We conclude that the State had no obligation to accept Coleman's plea bargain offer. *See Hererra* [sic], 640 F.2d at 962; *accord United States v. Pleasant*, 730 F.2d 657, 663-65 (11th Cir.) (involving offer made and withdrawn when not initially accepted), *cert. denied*, 105 S. Ct. 216 (1984). Neither the State's acceptance of Nank's plea offer nor Coleman's death sentence alters this analysis. *See Brooks v. Estelle*, 697 F.2d 586, 588 (5th Cir.), *stay denied*, 459 U.S. 1061 (1982); *McMillin* [sic] *v. United States*, 583 F.2d 1061, 1063 (8th Cir.), *cert. denied*, 439 U.S. 1049 (1978).

B. *"Black Boy" Reference*

Coleman points to the trial court's reference to him as a "black boy" to support his allegation of racial discrimination. The use of the term in reference to Coleman was first made during the trial by Coleman's own counsel during cross-examination of a witness. The court's use of

the phrase occurred in chambers in ruling on a motion for dismissal or judgment of acquittal at the close of the government's case. At that point in the proceedings the following colloquy occurred:

Prosecution:	May the record show that the prosecution resists the motion.
The Court:	Well, I treat this as a real serious motion.
Prosecution:	In what regard?
The Court:	Well, I'm not going to grant the motion, but I say it has some merit.
Prosecution:	I frankly don't think it has any. We could have gotten to the jury on circumstantial evidence alone, Your Honor, and I'm confident of that.
The Court:	Well, all you've shown is the opportunity for this black boy to do it. You've shown plenty of opportunity.

We have expressed concern about the influence race may have in the imposition of the death penalty. *Harris*, 692 F.2d at 1198 n.4. "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 106 S. Ct. 1683, 1688 (1986). We do not agree with the State that the court's reference to Coleman as a "black boy" was "charitable;" however, when placed in context and viewed in light of the entire trial transcript, it does not establish Coleman's claim of racial discrimination. *See United States v. Herbert*, 698 F.2d 981, 984 (9th Cir.) (defendant must show prejudice stemming from comment), *cert. denied*, 464 U.S. 821 (1983); *United States v. Price*, 623 F.2d 587, 592-93 (9th Cir.) (same), *cert.*

denied, 449 U.S. 1016 (1980); *James v. State*, 270 Ark. 596, 605 S.W.2d 448, 451 (1980) (in chambers reference to defendant as "boy" not prejudicial); *People v. McGowen*, 269 Cal. App. 2d 740, 743, 75 Cal. Rptr. 53, 54-55 (1969) (no prejudice from unobjected to comment). *Compare Berry v. United States*, 283 F.2d 465, 467 (8th Cir. 1960) (repeated racial comments made in jury's presence held prejudicial), *cert. denied*, 364 U.S. 934 (1961); 34 A.L.R. 3d 1313, 1320, 1328-30 & n.19 (1970 & Supp. 1986) (discussing cases). *Cf. Harris*, 692 F.2d at 1197 (evidentiary hearing required when facts in dispute and if proved entitled defendant to relief).

VII

SENTENCING HEARING

Coleman argues that the sentencing hearings and the trial court's "FINDINGS, CONCLUSIONS, JUDGMENT AND ORDER" ("Findings") dated July 10, 1978, violated due process. Before evaluating his contentions, we examine these proceedings and the court's Findings.

A. *The June 14th Hearing*

By its decision in *Coleman I*, the Montana supreme court affirmed Coleman's convictions on all counts. His sentence to serve one hundred years on Count I for deliberate homicide was affirmed. His death sentence for aggravated kidnapping and his sentence to serve forty years for sexual intercourse without consent, inflicting bodily injury, were vacated. The case was remanded to the trial court for resentencing. The remand was received by the trial court on June 2, 1978. On that day the judge

who had previously sentenced Coleman to death notified counsel of record that Coleman's sentencing hearing would be held June 14, 1978, and that the hearing would be conducted "in accordance with section 95-2206.06 through 95-2206.11, RCM, as amended."

At the beginning of the June 14th hearing, the court stated that it "had set down for hearing today the matter of mitigation of punishment, intended to reserve for a subsequent date the sentencing." Defense counsel had filed a motion that day challenging the constitutionality of applying the newly amended 1977 death penalty statutes to Coleman's case. The State had not responded to this motion. The court stated: "Of course the first question that arises in the Court's mind, is should the Court [proceed] with the hearing at this time on the matter of mitigation, and of course on one count the Court feels that it may as well proceed, but I'd like to hear from you [defense counsel]." Coleman's counsel suggested that the State might want an opportunity to respond to his motion, and stated:

> I would suggest that the Court continue, and I'm not making this in the form of a formal motion, but I am suggesting that the Court continue this matter in regard to sentencing. . . .In addition, Your Honor, and as another point which has some bearing upon the Court's determination as to how to proceed, is that we have to present here at this time, no mitigating factors at all. It would be a matter of simply argument. There is a pre-sentence investigation report. I take the view that the situation is primarily one of law, to be resolved as to how the Court should proceed, and then I take the view that unless [the State] wishes to present witnesses, that at the time of sentencing is just simply a statement by [the State's attorney] pointing out what he thinks relevant and a

> statement pointing out what I think is relevant, and the Court decides if that's the way we are to proceed.

The court stated:

> Well, the Court has two matters to sentence on, and there is always a possibility that after the Court has considered [defense counsel's] brief, it might rule favorably on [defense counsel's] motion, and in that event there would be no necessity for the Court to make any finding [of aggravating or mitigating circumstances] or anything else under the–under the existing statute. . . . So I think we are just going to proceed particularly with the announcement that you didn't intend to present any mitigating circumstances, and particularly because there is another count upon which this Court was called upon to reimpose sentence. I'll call then–or ask for responding briefs to the brief that has now been submitted by the defendant. The Court has received–I called for and have received a pre-sentence report, which I now cause to be filed in accordance with the law. The reporting officer, Mr. Thomas Lofland, is present in court. The defendant has received a copy of this presentence investigation. The significant part of it relative to mitigating circumstances is that the defendant has never been convicted of any felony prior to this charge. Now if there are any matters which either the State or the defense wish to clarify with reference to this report, Mr. Lofland is present and you may call him to the stand and you may make any inquiries that you feel are pertinent.

Neither side elected to call the reporting officer, Mr. Lofland, as a witness. The court then stated:

> Now with the announcement that the defense does not intend to produce any–call any witnesses to establish any mitigating circumstances, the Court of course has before it all matters during the course of

> the trial, heard the testimony relating to the aggravating circumstances and also some to mitigating circumstances.[7] Does counsel for the State now wish to make any statement relative to aggravating circumstances?

In response, the State attempted to call Coleman as a witness, but he declined to testify. The court then stated that it would "render its findings of fact and will go up on the record that is present in the absence of any mitigating circumstances presented by the defendant at this hearing." It was agreed that the State would file a brief in which it would point out the places in the trial transcript which it believed contained references to aggravating and mitigating circumstances, and the defense would have an opportunity to respond to that brief. The court asked the State if it wanted to make proposed findings of fact, and the State responded that it would do so. The court also invited the defense to prepare proposed findings. The hearing was then adjourned.

B. *The July 10th Hearing*

The court set July 10, 1978 as the date for Coleman's sentencing. On that date, at the beginning of the hearing, the court handed counsel for Coleman and the State an unsigned copy of its Findings. Coleman's attorney did not raise an objection to this procedure. After resolving a preliminary matter, the court stated:

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[7] At his trial, Coleman testified to his previous clean criminal record, military service, psychological problems, and community service.

> Well, I want you to know that I have considered all of – everything that you have submitted and have given it thought, and that this isn't just a matter that the Court takes lightly . . . . The court has set this time for sentencing of the defendant. Since the sentencing hearing, the Court has received copies of briefs and has considered the motion of the defendant to quash and having studied and considered the matter, has prepared its findings as required by law. Before pronouncing sentencing, [sic] does counsel have anything to say to the Court?

Defense counsel then read into the record a statement he had prepared on Coleman's behalf. He asked the court to consider that Coleman had never "been in any trouble before," that the crimes of which he had been convicted were inconsistent with his "whole history as shown by the records in this case," and that reports from people who had known Coleman in Great Falls, Montana where he had worked were favorable. The State responded, arguing among other things, that Coleman had initiated the attempts to kill Harstad, that Harstad had been killed to "destroy the evidence" of her kidnapping and sexual assault, that according to the pre-sentence report Coleman had feigned homosexuality to convince the court he did not rape the victim, and that Coleman's guilt had been determined beyond a reasonable doubt by the jury. The court then stated:

> THE COURT: In pronouncing sentence I do want the parties to know that this is a decision that is extremely agonizing for the Court to make. I have not looked at the points that have been raised lightly, but many of the arguments raised by the defense, of course have been considered heretofore, and the jury have found from the factual

> standpoint that the defendant was guilty beyond a reasonable doubt, and I do not disagree with that conclusion of the jury. The one mitigating circumstance is that the defendant has not prior to this time been convicted of any felony, but in view of the enormity of the crime committed, and the Court's feeling that this one circumstance does not overcome the aggravated circumstances, I have made findings to this effect, written findings as required by law. Also I have made conclusions and judgment which have been furnished to the defendant and the State at this time, and I will only at this time read the Court's conclusions and judgment.

The court then read its conclusions and judgment by which Coleman was sentenced to death.

C. *The Court's Findings*

The court's written Findings reviewed the evidence of the Harstad murder and kidnapping and concluded as to aggravating circumstances:

> 1. That the aggravating circumstances set forth in Section 95-2206.8, paragraph (7) exists for the reason following:
>
> > That the offense of aggravated kidnapping was committed by the defendant and it resulted in the death of the victim, Miss Peggy Harstad.

The findings also discussed the mitigating circumstances listed in Mont. Code Ann. § 95-2206.9. As to the

first factor, that "the defendant has no significant history of prior criminal activity," *id.*, the court found:

> 2. That the State has been unable to prove by means of record checks that the defendant has any other history of criminal activity. The only other criminal act which appears in the trial record in this cause is aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Section 95-2206.9(1) is not appropriate to this defendant.

As to the remaining mitigating circumstances listed in the Montana Code, *id.* § 95-2206.9(2) to (8), including whether "any other fact exists in mitigation of the penalty," *id.* (8), the court found:

> 3. That there is no evidence appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of any of the circumstances in mitigation under the other numbered paragraphs of Section 95-2206.9, mainly paragraphs (2) through (8).

The court found, among other things, that the offenses were not committed while the defendant was under the influence of any mental or emotional disturbance, the defendant was not a minor, and was a willing participant in the crimes.

In its Conclusions, the court stated:

> 2. That none of the mitigating circumstances listed in Section 95-2206.9 R.C.M. are sufficiently substantial to call for leniency. That the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity.

1. *Consideration of Mitigating Circumstances*

Coleman first argues that the trial court failed to consider mitigating circumstances dealing with his personal history and characteristics. Although he did not present any evidence as to mitigating circumstances at the sentencing hearing, *see Darden v. Wainwright*, 106 S. Ct. 2464, 2474 (1986) (similar decision at death sentence hearing); *Baldwin v. Alabama*, 105 S. Ct. 2727 (1985) (*passim*, same); *Williams v. Oklahoma*, 358 U.S. 576, 583 (1959) (same), the pre-sentence report listed several factors which Coleman argues militated in favor of leniency, including: his community service, clean record, and alleged psychological disorders. The trial court stated that it had considered all of the evidence and materials presented in rendering its Findings. *See also Coleman II*, 185 Mont. 299, 605 P.2d at 1019 (rejecting contention that trial court did not give "proper consideration to evidence when making its findings").

State court findings of fact arrive at a federal habeas corpus proceeding with a "presumption of correctness." *Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (per curiam). This presumption applies both to state trial and appellate court findings of fact, *id.* (involving state appellate court's interpretation of trial court proceedings in imposing death sentence), and may only be overcome by " 'convincing evidence.' " *Kennick v. Superior Court*, 736 F.2d 1277, 1281 (9th Cir. 1984) (quoting 28 U.S.C. § 2254(d)).

The record reveals that the trial court considered all of the evidence and arguments presented regarding mitigation, but found that there was no evidence of mitigating factors sufficiently substantial to call for leniency. At

the June 14th hearing, the court stated that it had received the pre-sentence report and noted that "the significant part of it relative to mitigating circumstances, is that the defendant has never been convicted of any felony prior to this charge." The trial court then agreed to accept a brief from the State and from Coleman's counsel specifically discussing the relevant aggravating and mitigating circumstances. *Coleman III*, 633 P.2d at 632. At that hearing and again at the later July 10th hearing, the court stated several times, without challenge, that it had read and considered all materials submitted. The court's Findings similarly stated it had reviewed "all matters submitted, together with the evidence produced at trial, and . . . [observed] the defendant's demeanor during trial and while testifying. . . ." Finally, at the July 10th hearing, Coleman's attorney reviewed for the court the circumstances from his client's personal history favoring leniency, and the State argued in rebuttal. In light of the trial court's repeated and unchallenged statements that it had received and considered all evidence presented, its specific reference to the presentence report, its acceptance of written briefs and oral argument regarding mitigating circumstances, and Coleman's decision to proceed on the basis of the written record, *see Williams v. Oklahoma*, 358 U.S. at 583 (and cases cited *supra* with full cite to this case), we conclude that the trial court considered all of the mitigating circumstances presented and concluded these factors were not sufficiently substantial to call for leniency.[8]

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[8] The dissent argues that "it is clear from the record and from the written findings that the judge failed to give any

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Coleman maintains, however, that the trial court's failure to discuss his personal history and characteristics in its Findings indicates the court did not consider these factors in sentencing. In a series of cases, the Eleventh Circuit has rejected the same argument. *Johnson v. Wainwright*, 778 F.2d 623, 629 (11th Cir. 1985); *Funchess v. Wainwright*, 772 F.2d 683, 693 (11th Cir.), *reh'g denied en banc*, 776 F.2d 1057 (1985), *cert. denied*, 106 S. Ct. 1242 (1986); *Raulerson v. Wainwright*, 732 F.2d 803, 805-08 (11th Cir.), *reh'g denied*, 736 F.2d 1528 (11th Cir.), *cert. denied*, 105 S. Ct. 366 (1984); *Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *reh'g denied*, 729 F.2d 1468 (11th Cir.), *cert. denied*, 105 S. Ct. 227 (1984); *Dobbert v. Strickland*, 718 F.2d 1518, 1523-24 (11th Cir.) (*Dobbert II*), *reh'g denied*, 720 F.2d

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consideration whatsoever to . . . Coleman's underprivileged and harsh childhood and adolescence, his military service, his good reputation in his neighborhood, his community service, and his psychological disorders." (Reinhardt, J. dissent at page 682). Further: "The record before us reveals that the court simply was unaware of or failed to consider Coleman's character and background." *Id.* at 684. Finally, the dissent claims the majority is speculating "as to what the sentencing judge actually considered." *Id.* at 691. This is not the case. The record affirmatively establishes that the sentencing judge read and considered the pre-sentence report. That report contained all of the circumstances the dissent argues the court should have considered. To suggest that the court must have been unaware of, or failed to consider, portions of a report which the court stated it had read and considered, not only speculates as to errors of omission the court may have committed, but flies directly in the face of the record. On the record before us, we cannot speculate that the sentencing judge omitted to do that which he tells us he did.

1294 (1983), *cert. denied*, 468 U.S. 1220 (1984). In *Dobbert II*, the court held:

> The fact that the sentencing order does not refer to specific types of non-statutory 'mitigating' evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered. Whether particular evidence, such as the fact that Dobbert had a difficult childhood, is mitigating depends on the evidence in the case as a whole and the views of the sentencing and reviewing judges. What one person may view as mitigating, another may not. Merely because the Florida courts, operating through a properly drawn statute with appropriate standards to guide discretion, do not share petitioner's view of the evidence reveals no constitutional infirmity. *See Proffitt v. Florida*, 428 U.S. at 258-59, 96 S. Ct. at 2969-70.

718 F.2d at 1524.

In *Funchess*, 772 F.2d 683, the trial judge's "Findings of Fact" were virtually identical to those made here. The judge in *Funchess* did not refer to the non-statutory mitigating factors, and stated "that sufficient aggravating circumstances exist . . . and this Court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 772 F.2d at 693 n.11. The Eleventh Circuit rejected Funchess' argument that the trial judge's "failure to discuss any aspect of the non-statutory mitigating circumstances is absolute proof that the trial judge failed altogether to consider these factors:"

> During the second resentencing hearing, Funchess presented evidence relating to certain non-statutory mitigating circumstances. The trial court considered this evidence but obviously was not persuaded that it justified the establishment of any non-

> statutory mitigating factors. Consequently, the trial judge did not include a detailed discussion regarding these alleged circumstances in his findings of fact. This court has on previous occasions held that '[t]he fact that the sentencing order does not refer to specific types of non-statutory 'mitigating' evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered.' [*Raulerson*, 732 F.2d at 807]. Accordingly, appellant's argument on this matter is without merit.

Id. at 693 (footnotes omitted).

We agree with the Eleventh Circuit that a trial judge's failure to discuss a defendant's personal history in its findings does not indicate that these factors were not considered. Montana's death penalty statute authorizes the trial judge to consider a defendant's personal history and characteristics, and lists as a mitigating circumstance "[a]ny other fact exist[ing] in mitigation of the penalty." Mont. Code Ann. §§ 95-2206.7 and 95-2206.9(8). That the trial judge did not refer to evidence of personal history in his Findings only indicates he found that this evidence did not mitigate the penalty and was not "sufficiently substantial to call for leniency." *Id.* § 95-2206.10. Indeed, the trial judge's comments at the July 10th hearing and his Findings expressly stated that this was his view. We must therefore reject Coleman's argument as inconsistent with the trial judge's own comments, a fair reading of the record, and the analysis enunciated by the Eleventh Circuit which we find persuasive.

2. *Discussion of Coleman's Personal History*

Coleman argues that even if the trial court considered all of the evidence presented and found it insufficient to justify leniency, the due process clause

nevertheless *requires* the sentencing authority to specifically discuss this evidence in its findings. We disagree.

The Supreme Court has emphasized that death, in its finality, is qualitatively different from any other punishment. *See, e.g., Gardner v. Florida,* 430 U.S. 349, 357-58 (1977). The Court has recognized that although sentencing will often involve the exercise of discretion, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Godfrey v. Georgia,* 446 U.S. 420, 427 (1981)(citation omitted); *see also Lockett,* 438 U.S. at 604 (state death penalty statute may not preclude sentencing authority from considering defendant's character). In *Lockett,* the Court held violative of due process an Ohio statute which only permitted consideration of three mitigating circumstances. The Court reasoned that the sentencer must not be "precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original). Similarly, in *Eddings v. Oklahoma,* 455 U.S. 104 (1982), the Court overturned a death sentence because the trial judge held it was precluded under Oklahoma law from considering the petitioner's violent background as a mitigating circumstance. *Id.* at 109. The Court concluded "it was clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113 (emphasis in original). The Court noted that "the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstances'. . . . *Lockett requires the sentencer to listen.*"

Id. at 115 n.10 (citation omitted). *See also Skipper v. South Carolina*, 106 S. Ct. 1669, 1670-71 (1986).

While *Lockett* and *Eddings* hold that the sentencing authority may not impose restrictions, as a matter of law, on the evidence presented by the defendant in mitigation, "[n]either of these cases establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all" *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983)(Stephens and Powell, J. concurring); *Johnson*, 778 F.2d at 629; *Raulerson*, 732 F.2d at 805-08; *Palmes*, 725 F.2d at 1523. The Court in *Eddings* emphasized that the error in that case was the trial court's self-imposed *legal* restrictions on the consideration of evidence presented in mitigation. 455 U.S. at 113-15. The Court carefully noted, however, that once the state courts admit evidence presented in mitigation, the "sentencer, and the [state court of appeals] on review, may determine the weight to be given relevant mitigating evidence." *Id.* at 114-15. The due process clause only precludes these courts from "giv[ing] it no weight by excluding such evidence from their consideration." *Id.* at 115. *See also Skipper*, 106 S. Ct. at 1670-71; *Spaziano*, 468 U.S. at 467 (federal court does not ask whether it agrees with state courts, only whether decision is "irrational or arbitrary"); *Raulerson*, 732 F.2d at 806-08.[9]

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[9] In *Raulerson*, the court rejected an argument similar to that presented by Coleman on facts virtually identical to those here:

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The Court's approval of various death penalty statutes demonstrates that the due process clause does not impose the requirement that Coleman would have us adopt. In *Jurek*, 428 U.S. 262, the Court upheld a Texas statute which required the jury to answer three general questions regarding mitigating and aggravating circumstances;[10] if the jury was unanimous, it could simply

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> A careful examination of *Eddings* reveals that the Constitution prescribes only that the sentencer hear and consider all the evidence a defendant chooses to offer in mitigation. There is no requirement that the court agree with the defendant's view that it is mitigating, only that the proffer be given consideration.
>
> . . .
>
> In summary, *Lockett* stands for the proposition that the sentencer must *consider* all mitigating evidence. After so doing, it then is generally free to accord that evidence such weight in mitigation that it deems fit.

Id. at 807-08 (emphasis in original).

[10] The questions were:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

428 U.S. at 269.

answer "yes" or "no" to these inquiries. *Id.* at 269 & n.5. The statute imposed no requirement that the jury provide findings discussing mitigating factors which it had rejected. *See Martin v. Maggio*, 711 F.2d 1273, 1286-87 (5th Cir. 1983) (*affirming, Martin v. Blackburn*, 521 F. Supp. 685, 715 (E.D. La. 1981)), *reh'g denied*, 739 F.2d 184 (5th Cir.), *cert. denied*, 105 S. Ct. 447 (1984). The Court emphasized that the Texas statute provided for prompt judicial review, and was constitutional because it assured "that sentences of death will not be 'wantonly' or 'freakishly' imposed. . . ." *Jurek*, 428 U.S. at 276 (citation omitted). Similarly, in *Gregg*, 428 U.S. 153, the Georgia statute required the sentencing authority to consider the list of aggravating circumstances provided in the statute and to consider any mitigating evidence presented by the defendant; if the verdict was death, the judge or jury was required to specify the aggravating circumstances found. *Id.* at 166, 197. The statute imposed no obligation on the sentencing authority to discuss mitigating factors presented but found insufficient to justify leniency. *See id.* at 163-67 & n.n.4-10 (quoting Georgia statute); *id.* at 197. The Court noted that the possibility of arbitrariness was reduced by requiring the state appellate court to examine whether the sentence was "excessive" and whether the evidence supported the jury's or judge's findings. *Id.* at 166-67, 206-07. The Court has approved other sentences in which the trial judge has made findings but not discussed factors dealing with a defendant's personal history considered by the judge but rejected. *See Baldwin*, 105 S. Ct. at 2731; *Spaziano*, 468 U.S. at 466-67 (involving Florida statute, which, like Montana's required judge to

list findings); *Proffitt*, 428 U.S. at 247, 250, 253 (same, noting state appellate review).

The record in this case does not indicate that the trial court imposed any restrictions on the introduction or consideration of evidence in mitigation. Rather, as noted, the court considered the evidence and materials presented and concluded that the factors in mitigation did not outweigh the seriousness of Coleman's offense. On appeal, the Montana supreme court found that the trial court had followed the Montana death penalty statute, *Spaziano*, 448 U.S. at 467, and evaluated the record to determine whether the evidence supported the trial court's Findings. Mont. Code Ann. § 95-2206.13. *See Gregg* 428 U.S. at 207. The Montana supreme court weighed the evidence and found no error:

> [The pre-sentence] report indicated the defendant had no record of criminal activity and had been an accepted member of the community where he lived prior to July 4, 1974, the date of the commission of this crime. The evidence in this case supporting the finding of the aggravating circumstance established that the defendant had been a deliberate, voluntary participant in the kidnapping and subsequent rape and murder of the victim. The evidence further established that the death of the victim occurred after a sexual assault, not in a moment of passion, but over a period of time with the defendant first bludgeoning, then attempting to strangle, then finally drowning the victim in an effort to effectuate a deliberate decision to kill Peggy Harstad. Against the record of this brutal crime, we cannot say that the defendant's lack of prior criminal activity of record is a factor sufficiently substantial to call for leniency.

Coleman II, 185 Mont. 299, 605 P.2d at 1019.

Due process requires that the state trial and appellate courts listen. *Eddings*, 455 U.S. at 115 n.10. The Montana courts have listened and rendered their judgment. "Whether or not 'reasonable people' could differ over the results here, we see nothing irrational or arbitrary about the imposition of the death penalty in this case." *Spaziano*, 468 U.S. at 467.

3. *Consideration of Roundup Burglary*

Coleman next argues that the trial court's consideration of Nank's trial testimony implicating Coleman in the Roundup burglary violated due process. His argument is two-fold: (a) that uncorroborated testimony about an unconvicted crime may not be used to demonstrate prior criminal activity; (b) that he never had notice of or an opportunity to contest this testimony. *See Skipper*, 106 S. Ct. at 1671 n.1.

a. *Nank's Testimony*

The Montana death sentence statute permits the court to consider in mitigation whether the "defendant has no significant history of prior criminal activity." Mont. Code Ann. § 95-2206.9. In *Coleman II*, 185 Mont. 299, 605 P.2d at 1019-20, the Montana supreme court held that this statute permitted the trial court to consider the Roundup burglary in sentencing. We have long held that the due process clause does not preclude the sentencing judge from considering evidence of prior criminal conduct not resulting in a conviction. *See, e.g., United States v. Morgan*, 595 F.2d 1134, 1136 (9th Cir. 1979); *United States v. Miller*, 588 F.2d 1256, 1266-67 (9th Cir. 1978) (citing

authorities from this court, *cert. denied*, 440 U.S. 947 (1979); *Farrow v. United States*, 580 F.2d 1339, 1359-60 (9th Cir. 1978) (en banc); *United States v. Weston*, 448 F.2d 626, 628-34 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); *United States v. English*, 421 F.2d 133 (9th Cir. 1970) (per curiam) (*passim*). In *Williams v. New York*, 337 U.S. 241 (1949) (*Williams*), the Court upheld the trial court's consideration, in imposing the death sentence, of some thirty burglaries allegedly committed by the defendant, even though he had not been convicted of these crimes. *Id.* at 244. *See also McMillan*, 106 S. Ct. at 2420 (discussing *Williams*); *Williams v. Oklahoma*, 358 U.S. at 583-84 (consideration of prior record in death sentence); *see also United States v. Wondrack*, 578 F.2d 808, 809-10 n.1 (9th Cir. 1978).

In *Morgan*, 595 F.2d 1134, we noted three due process limitations on a court's use in sentencing of crimes for which a defendant has not been convicted. *First*, a court may not consider evidence obtained in violation of the principles underlying *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Morgan*, 595 F.2d at 1136. *Second*, a court may not consider false information. *Id.* (citing *Townsend v. Burke*, 334 U.S. 736 (1948)). *Third*, a court may not consider information derived solely from a pre-sentence report " 'unless it is amplified by information such as to be persuasive of the validity of the charge there made.' " *Id.* (quoting *Weston*, 448 F.2d at 634). In *United States v. Ibarra*, 737 F.2d 825 (9th Cir. 1984), we expanded upon the second and third limitations expressed in *Morgan* and held that the challenged information is " 'false or unreliable' if it lacks 'some minimal indicium of reliability beyond mere allegation.' " *Id.* at 827 (citation omitted); *see also United States v. Hull*, 792 F.2d 941, 942-43 (9th Cir. 1986)

(applying this standard to evidence of unconvicted crimes; noting abuse of discretion standard to trial court's determination). Contrary to Coleman's contention, our cases have never established any *per se* rule preventing consideration of uncorroborated testimony in imposing sentence. Rather, the controlling inquiry is whether the evidence is minimally reliable. *Id.* at 942. *Accord United States v. Whitten*, 706 F.2d 1000, 1007 (9th Cir. 1983) (evidence for conviction), *cert. denied*, 465 U.S. 1100 (1984). *See also United States v. Florence*, 741 F.2d 1066, 1069 (8th Cir. 1984) (judge may consider uncorroborated hearsay; citing *Farrow*, 580 F.2d at 1360); *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983) (same); *United States v. Ray*, 683 F.2d 1116, 1120 (7th Cir.) (same, citing authorities), *cert. denied*, 459 U.S. 1091 (1982); *State v. Koon*, 298 S.E.2d 769, 773 (S.C. 1982) (death penalty context) (disapproved on other grounds in *Skipper*, 106 S. Ct. 1669); *Alvord v. State*, 322 So.2d 533, 538 (Fla. 1975) (same), *cert. denied*, 428 U.S. 923 (1976). *See McMillan*, 106 S. Ct. at 2420 (citing *Williams*, 337 U.S. 241, a death penalty case, and noting that evidence is often considered in discretion of judge without burden allocation or standard of proof).

Nank's testimony regarding the Roundup burglary satisfied this standard. The trial judge observed Nank while he testified and heard his testimony first hand. *See United States v. Cruz*, 523 F.2d 473, 476 (9th Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976). The trial judge also observed Coleman as he testified at the trial and heard him deny any involvement in the burglary. At the July 10th hearing, Coleman's counsel generally denied any involvement by Coleman in prior criminal activities. But he did not challenge the reference to Coleman's participation in the

Roundup burglary in the pre-sentence report or in the trial court's unsigned Findings which were distributed at the beginning of the July 10th hearing. Coleman's counsel declined to call Nank to testify at the sentencing hearing and subjected him to further cross-examination.[11] In addition, the Montana supreme court determined that Nank was corroborated on several points. *Coleman I*, 177 Mont. 1, 579 P.2d at 748 (including Negroid pubic hairs found in the Harstad vehicle and Coleman's fingerprints in the car and purse).

Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam), cited by Coleman, does not change our conclusion. There, the jury sentenced the defendant to death. Although the jury did not find that the defendant had committed the necessary aggravating element of forcible rape, the Georgia supreme court sustained the conviction because the evidence would have supported that finding. *Id.* at 15-16. The Court reversed because the jury did not convict the defendant of forceable [sic] rape and the sentence could not be sustained on a theory not accepted by the jury. *Id.* at 16-17. Unlike the Georgia supreme court in *Presnell*, the trial judge here was authorized to enter sentence and determine the existence or nonexistence of aggravating or mitigating circumstances. Mont. Code Ann. §§ 95-2206.6 and 95-2206.10. *See Spaziano*, 468 U.S. 447 (*passim*) (upholding statute permitting trial court to enter sentencing in death penalty). The trial judge, like the jury, found that Coleman had committed aggravated kidnapping.

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[11] We discuss *infra* text following this subsection Coleman's argument that he had no opportunity to contest Nank's testimony regarding the Roundup burglary.

Once the court found this aggravating circumstance, the court determined that Coleman was not entitled to mitigation credit for his otherwise clean record, because of his participation in the Roundup burglary and the enormity of his offense. We find nothing irrational or arbitrary about the trial court's weighing of these factors, *see id.* at 467, nor may we substitute our judgment for that of the Montana courts. *Id.*

b. *Notice and Opportunity*

The Supreme Court has stated that to comply with due process, notice must "apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 14 (1978) (footnote omitted). The record reveals Coleman received adequate notice to prepare for the sentencing court's consideration of the Roundup burglary. The sentencing judge notified counsel for Coleman and the State that the sentencing hearing would be held on June 14th in accordance with Montana's death sentence statute. This statute authorizes the court to consider evidence proffered at trial (and probative on the sentence the defendant should receive) without reintroduction at sentencing. Mont. Code Ann. § 95-2206.7. Both Nank and Coleman had testified at trial concerning the Roundup burglary. Further, the pre-sentence report discussed the Roundup burglary and the report was furnished to Coleman's counsel at the June 14th hearing. Coleman's counsel referred to the contents of this report at the June 14th hearing. Finally, Coleman's counsel received the trial court's unsigned Findings (which referred to the Roundup burglary) at the beginning of the later July 10th hearing. At no time did Coleman's counsel indicate a

desire to re-examine Nank, challenge his testimony other than by oral argument, request a continuance to recall Nank, or take any other steps to attack the claim that Coleman participated in the Roundup burglary. *See Gorham v. Wainwright*, 588 F.2d 178, 180 (5th Cir. 1979); *see also In re Acequia, Inc.*, 787 F.2d 1352, 1360 (9th Cir. 1986) (civil context; discussing notice requirements and counsel's failure to request continuance).

For similar reasons, the record does not support Coleman's claim that he had no opportunity to challenge Nank's testimony. We agree with the Montana supreme court that Coleman "at the first hearing, did not testify in mitigation, declined to examine the officer who prepared the pre-sentence report, and was given an opportunity to submit both further briefs on sentencing and his proposed findings and conclusions." *Coleman III*, 633 P.2d 632. We note also that at the second hearing Coleman again declined the opportunity to challenge Nank's testimony. *See also Coleman II*, 185 Mont. 299, 605 P.2d at 1018.

4. *Distribution of Trial Court's Findings*

Coleman contends that the trial court's preparation of its unsigned Findings before the July 10th hearing violated due process. This argument, however, ignores the trial court's statement at the June 14th hearing:

> Now the announcement that the defense does not intend to produce any–call any witness to establish any mitigating circumstances, the Court has before it all matters during the course of the trial, heard the testimony relating to aggravating circumstances and also some mitigating circumstances. . . .

The court then indicated it would "render its findings of fact and will go up on the record that is present in the

absence of any mitigating circumstances presented by the defendant at this hearing." The court also requested proposed findings from the parties. Given the court's statement that it would prepare its Findings, we find unpersuasive the argument that the court's preparation of these findings for the July 10th hearing violated due process. The court did exactly what it said it was going to do, and did so without any objection from Coleman.

5. *Reliance on Undisclosed Information*

Coleman finally argues that he had no knowledge of the statements made by his former counsel at the July 2, 1975 hearing,[12] and that these statements prejudiced the trial court when it pronounced sentence on July 10, 1978.

The record does not support Coleman's contention that he did not know about his counsel's statements of July 2. Coleman was present at the hearing on July 3, 1975. As the Montana supreme court found, Coleman's counsel referred to the sodium amytal examination at that hearing, and indicated Coleman was willing to plead guilty and reconduct the examination before the court. *Coleman IV*, 663 P.2d at 1158-59, 1160. These statements correspond to what was said at the July 2nd hearing–that in context of the plea bargain, the sodium amytal examination refreshed Coleman's memory and he was therefore ready to plead guilty. According to Coleman's former counsel, Coleman had previously "blocked out" his alleged participation in the Harstad murder until he had taken the sodium amytal examination and was willing to

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[12] The contents of that hearing are discussed *supra* in the statement of facts.

repeat the examination before the court. In addition, Coleman cannot now claim undisclosed knowledge of his counsel's attempt to withdraw, because his counsel repeated this request at the July 3rd hearing:

> I believe there are certain professional and certain ethical positions both as an individual and as an attorney, and I have indicated to Mr. Nank – or to Mr. Coleman, that if I have to continue in this case if we have to try this case, then there is no way in the world I can state to the jury that he is innocent of deliberate homicide and that he's innocent of sexual intercourse without consent. . . .Now – however, I want the record to be clear that I feel that because of my moral and professional, ethical decisions, that I should be relieved. . . .
>
> The only thing I can do . . . is attack fully the question of whether they can establish aggravated kidnapping.

Further, Coleman has not alleged any facts demonstrating the trial court relied on his counsel's statements in sentencing Coleman. A sentence will be vacated on appeal only if the information presented to the court is (a) false or unreliable, and (b) demonstrably made the basis for the sentence. *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986) (citing authorities). In the context of a request for a writ of habeas corpus, "a motion must be denied unless it affirmatively appears in the record that the court *based* its sentence on improper information." *Farrow*, 580 F.2d at 1359 (emphasis in original); *United States v. Perri*, 513 F.2d 572, 574 (9th Cir. 1975). *See Gardner*, 430 U.S. 349, 353 (involving reliance by sentencing judge on undisclosed information). The Montana supreme court carefully reviewed the record and found "no indication that the sentencing judge considered

defense counsel's statement or the sodium amytal examination results in sentencing Coleman." *Coleman IV*, 663 P.2d at 1160. *See Goode*, 464 U.S. at 85 (even if sentencing record in death penalty hearing is ambiguous, federal court should defer to state appellate court factual findings in death sentence case). Our independent review of the sentencing hearing transcript and the trial court's Findings fully supports this conclusion.

Coleman in effect urges adoption of a *per se* rule requiring reversal whenever a judge hears inherently prejudicial information and subsequently (here three years later) enters a death sentence. He constructs this argument around our holding in *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). In *Lowery*, the defendant was charged with first degree murder and pleaded not guilty. In a trial in which the judge served as the trier of fact, the defendant testified during examination by her counsel and denied shooting the victim. Her counsel immediately requested a recess and a meeting with the judge outside of the defendant's presence. The defendant's counsel moved to withdraw from the case; he did not explain the reason, and the trial court denied the motion. *Id.* at 729. In closing argument, the defendant's counsel did not refer to his client's claims of innocence. The trial judge found the defendant guilty. We reversed, stating: "[I]f, under these circumstances, counsel informs the fact finder of his belief [that his client's defense is based on false testimony] he has, by that action, disabled the fact finder from judging the merits of the defendant's defense." *Id.* at 730. We emphasized in *Lowery* that the "judge, and not a jury, was the fact finder." *Id.* In the present case, a jury, not a judge, was the finder of fact.

The jury never heard Coleman's counsel's comments, and found Coleman guilty of murder and aggravated kidnapping nonetheless. Although the trial judge heard these comments in a plea bargaining context and sentenced Coleman three years later, the sentencing occurred only *after* the jury had found Coleman guilty beyond a reasonable doubt.

Coleman maintains, however, that the trial judge was the fact finder at sentencing and that *Lowery* should be extended to this case. Acceptance of this argument would contradict the requirement, repeatedly expressed in our case law, that to warrant reversal the judge must actually rely on improper information in sentencing. *See, e.g., Messer*, 785 F.2d at 834. This rule is sound and should not be disturbed. A trial judge will often be exposed to, and even consider in sentencing (*see United States v. Mills*, 597 F.2d 693, 699 (9th Cir. 1979)) evidence and accusations which would be wholly inadmissible in a trial on a defendant's guilt or innocence. *See, e.g., Williams*, 337 U.S. 241 (death sentence context); *United States v. Wright*, 593 F.2d 105, 109 (9th Cir. 1979) (illegally seized evidence). The prosecution may attempt to introduce, at sentencing, information which is prejudicial, unreliable or simply false. *See, e.g., Townsend*, 334 U.S. 736; *Weston*, 448 F.2d 626. To hold that a judge may not sentence the defendant because of exposure to such prejudicial information would be unwarranted, especially where, as here, the judge presided over an extensive trial and heard all of the testimony and evidence presented to the jury which found Coleman guilty. *See, e.g., United States v. Montecalvo*, 545 F.2d 684, 685 (9th Cir. 1976) (involving motion

for recusal), *cert. denied*, 431 U.S. 918 (1977); *Commonwealth v. Wilson*, 381 Mass. 90, 407 N.E.2d 1229, 1248-49 (1980) (due process challenge in death penalty case); *accord United States v. Bunch*, 730 F.2d 517, 519 (7th Cir. 1984) (recusal motion). To further conclude that a *violation* of due process has occurred at a sentencing hearing, even though the record reveals no reliance on the prejudicial information, would represent an inappropriate extension of *Lowery* to a different context. The concerns underlying *Lowery* – a defendant's counsel informing the trier of fact at trial of his client's deception – are not present here; nor would an extension of *Lowery* comport with our case law dealing with sentencing or the rationale underlying those cases.[13]

AFFIRMED.

APPENDIX

95-2206.6. Sentence of death – hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 95-2206.8 and 95-2206.9 for the purpose of determining

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[13] Coleman's other contentions regarding the trial court's *sua sponte* amendment of the information to include the kidnapping count, and the trial court's special interrogatory concerning whether the kidnapping had caused the victim's death, are without merit. *Coleman I*, 177 Mont. 1, 579 P.2d at 745-46, 751.

the sentence to be imposed. The hearing shall be conducted before the court alone.

95-2206.7. Sentencing hearing – evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

95-2206.8. Aggravating circumstances. Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 94-5-102 and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnapping which resulted in the death of the victim.

95-2206.9. Mitigating circumstances. Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

95-2206.10. Consideration of aggravating and mitigating factors in determining sentence. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 95-2206.8 and 95-2206.9 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 95-2206.8 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

95-2206.11. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in 95-2206.8 and 95-2206.9. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

95-2206.12. Automatic review of sentence. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana as provided for in 95-2206.13 through 95-2206.15.

95-2206.13. Review of death sentence – priority of review – time for review. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless

the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

95-2206.14. Transcript and records of trial transmitted. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

95-2206.15. Supreme court to make determination as to the sentence. The Supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 95-2206.8 and 95-2206.9; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.